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A TREATISE

ON THE LAW OF

COMMERCIAL PAPER

CONTAINING

A FULL STATEMENT OF EXISTING AMERICAN AND FOREIGN STATUTES,
TOGETHER WITH THE TEXT OF THE COMMERCIAL CODES
OF GREAT BRITAIN, FRANCE, GERMANY AND SPAIN.

BY

JOSEPH F. RANDOLPH,
OF THE NEW JERSEY BAR.

IN THREE VOLUMES, WITH APPENDIX.

VOL. I.

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TO THE
Honored Memory
OF MY FATHER,
JOSEPH F. RANDOLPH,
OF NEW JERSEY,

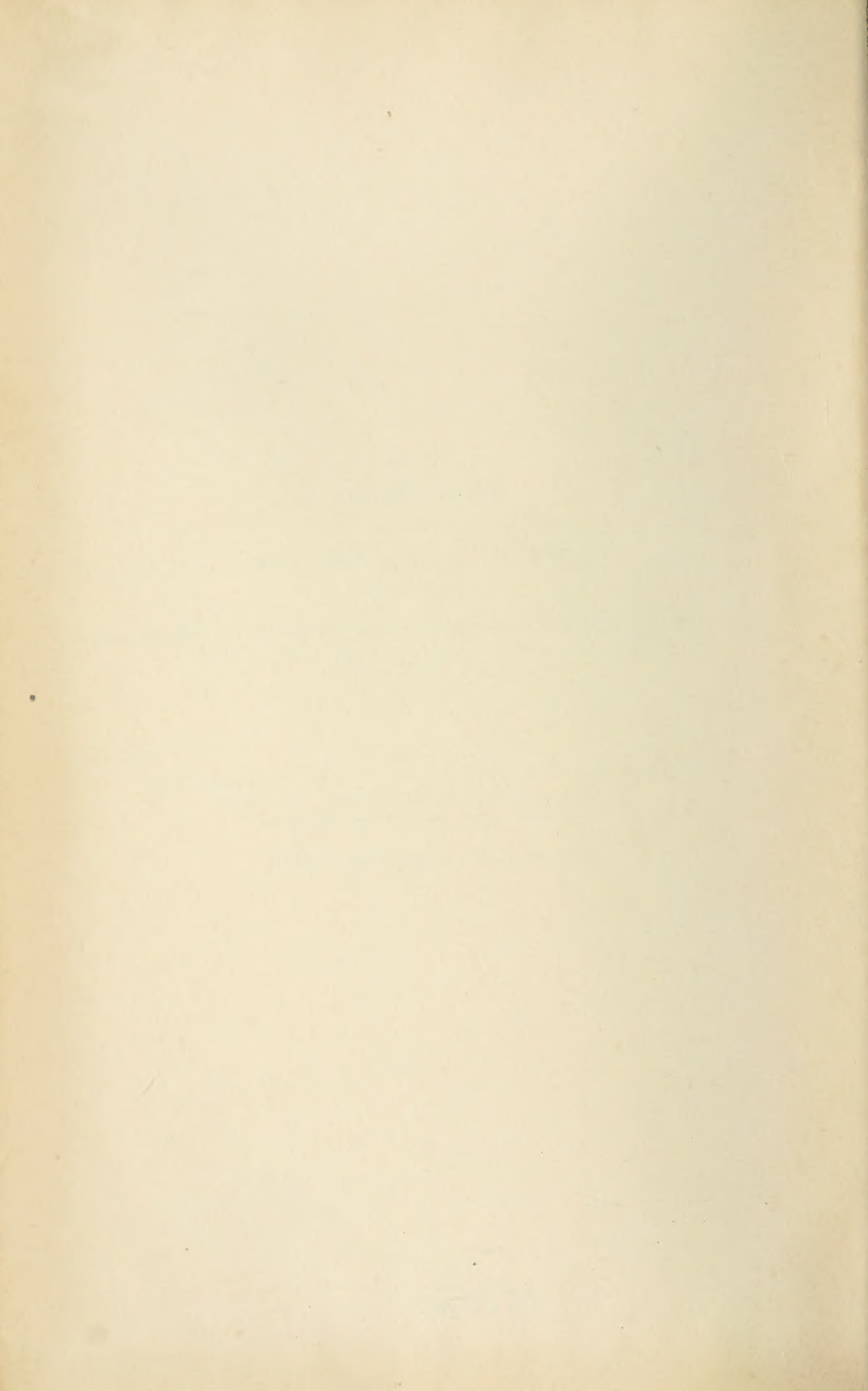
WHO LOVED THE LAW AS A GREAT BILL OF RIGHTS, AND DEVOTED HIS LONG AND
USEFUL LIFE TO IT AS THE BEST DEFENSE OF MEN'S RIGHTS
AND AVENGER OF THEIR WRONGS,

THIS BOOK IS OFFERED,

IN GRATEFUL MEMORY OF
THE PRECEPTS AND EXAMPLE, BY WHICH HE EVER ENCOURAGED THAT
EXACT JUSTICE, THAT DILIGENCE, THAT REASONABLE
CHARITY, WHICH MAKE AND ADORN

THE LAW OF COMMERCIAL PAPER.

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PREFACE.

Commercial paper, as an instrument of exchange, has no ancient law. Its origin, although obscure, is not traceable into a remote past, and if not born, it has at least grown up, with the cities and commerce of modern times. Throughout Europe, and within the present century, the rules that govern bills of exchange have taken the form of codes. By the Code Napoleon, the Spanish Code of Commerce, the German Exchange Law and the more recent English Bills of Exchange Act, and their various derivatives, the transactions of nine-tenths of the commercial world are now governed.

In a few of the United States this important branch of the law has been codified; and since the adoption of the English Bills of Exchange Act in 1882, effort has been made to procure the enactment of a similar law by the Congress of the United States. This has been met at the outset by grave questions as to the constitutional power of Congress in the matter. In Canada, the power to legislate on this subject is now happily exclusively reserved to the Parliament of the Dominion by the imperial Act of Parliament, by which it was constituted.

It has been well said by the learned author of the recent English statute, that the province of a code is to state with authority, in brief, precise and orderly fashion, the existing law; not to invent new principles or reform old ones. Following his own rule, the first step taken by Mr. Chalmers in his great work was to read all the English cases (some 2,500), and make a digest of the principles of law established

by them and modified by a score of English statutes. The American who would render a like service to his brethren of the American Bar, with due respect to the courts and legislation of *all* the States and to the necessities of *the bar of the whole country*, must give years to the work where his English example gave months; must read thousands of cases, in addition to the hundreds that the English reports contain, and examine hundreds of statutes, in addition to the score of British Acts.

In the meantime, while our overworked profession waits for a brief and precise statement of simple and almost universal laws—while Cicero and the later prophets fail, and it is still “*alia lex Romæ, alia Athenis*”—and while American legislatures give us a yearly supplement of a dozen laws, and our courts add five hundred varying decisions, on the old and finished subject of commercial paper, a new compilation and statement of the law, as it now is and as it has been since we were a people, may be welcomed as a service to the Bar. As such this work is offered to the profession, in the hope that the toil of one may lighten the labors of many, and that the arrangement and statement of the law, in its diversities as well as in its unity, may be some contribution toward the noble work of rendering at least one modern branch of law more simple and more universal, and making a possibility of that bold presumption that all men know the law. In this hope the author has ransacked the entire body of reported American and English cases and of modern text-books upon this subject, as well as the whole mass of American, English and Foreign statute law, verifying, correcting and rejecting citations, and aiming throughout at a correct and concise statement of the points decided and enacted, without opinion or comment of his own.

For the sake of brevity, leading text-books are referred to by the author's name only, the citation being invariably that of the American paging or paragraph (if so designated) of the last American edition,

i. e., the seventh American edition of Byles on Bills, the thirteenth of Chitty on Bills, the third of Daniel on Negotiable Instruments, the third of Edwards on Bills, the second of Parsons on Bills and Notes, the fourth of Story on Bills and the seventh of Story on Promissory Notes. For information as to foreign statutes the author is indebted chiefly to the careful and excellent compilation of *WECHSELGESETZE*, prepared and published in Germany by Justizrath von Borchardt.

JOS. F. RANDOLPH.

JERSEY CITY, N. J.

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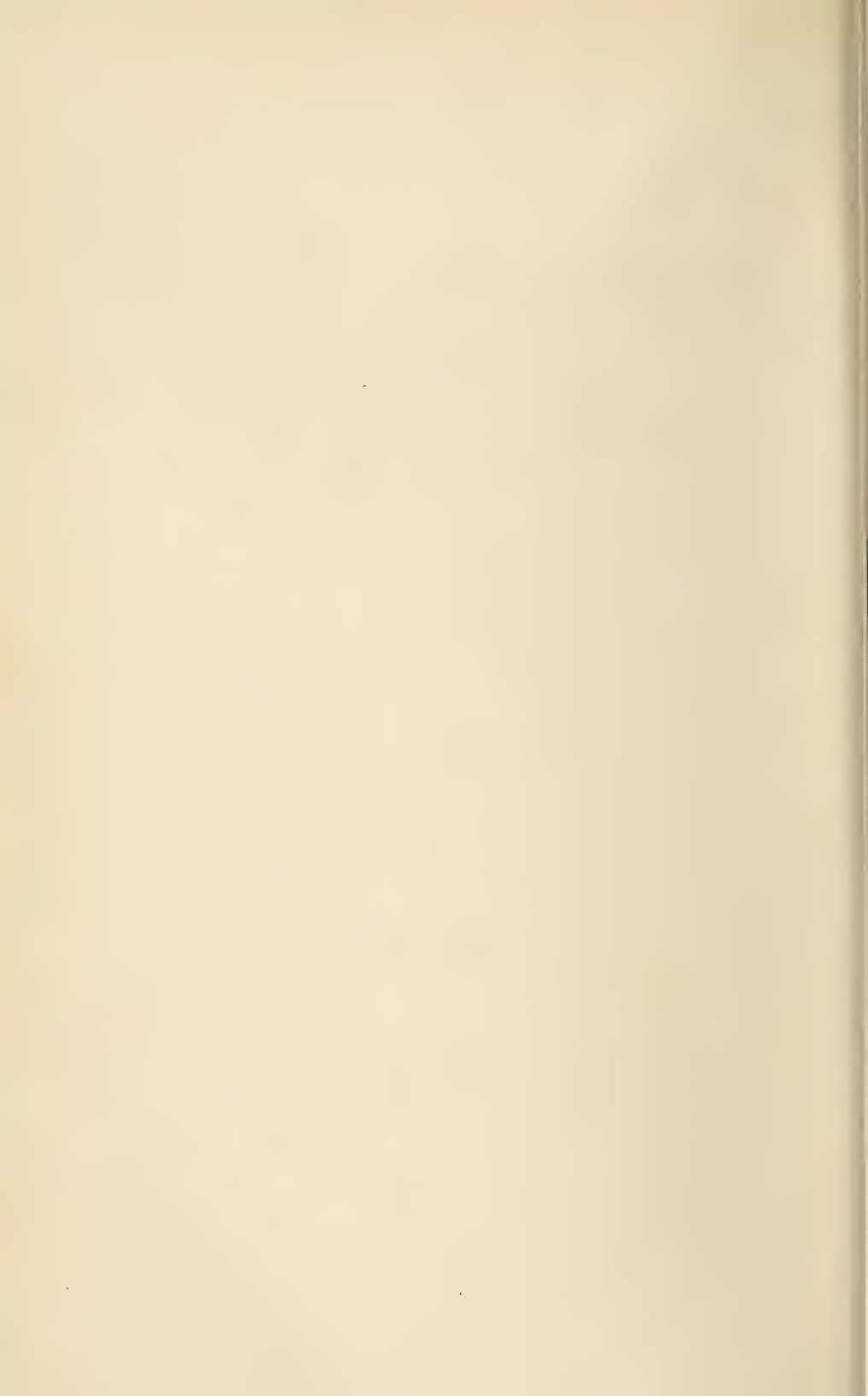
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COMMERCIAL PAPER.

CHAPTER I.

GENERAL PRINCIPLES AND DEFINITIONS.

1. Commercial paper—includes what.
2. Negotiable instruments.
3. Bills of exchange—Foreign—Inland.
4. Bills of exchange—Parties.
5. Acceptance—Acceptance *supra* protest.
6. Presentment for acceptance—Dishonor—Protest and notice.
7. Promissory notes.
8. Checks.
9. Bank-notes.
10. Letters of credit.
11. Certificates of deposit—Due-bills.
12. Corporation bonds—Coupons.
13. Transfer—Indorsement.
14. Holder—"Bona fide holder for value."
15. Consideration—Accommodation.
16. Maturity—Grace.
17. Presentment for payment—Payment.
18. Dishonor—Protest and notice.
19. Action—Procedure—Damages.

§ 1. **Commercial Paper** is rather a popular than a technical expression, often used, however, both in statutes and in decisions of courts to designate those simple forms of contract long recognized in the world's commerce and governed by the law merchant. This *lex mercatoria* or common law of merchants is of more universal authority than the common law of England. It applies, in general, to bills of exchange, promissory notes, checks, bank-bills and letters of credit. And in more recent times its principles have been extended, in part at least, to other evidence of indebtedness, such as due-bills, certificates of deposit and corporation bonds.

§ 2. **Negotiable Instruments.**—These instruments may be *negotiable* in the legal sense of the term or *non-negotiable*.

To the latter class belong those which by reason of their form or character possess only the quality of transferability incident to all simple contracts. Negotiable instruments, on the other hand, may be so transferred as to give the assignee greater rights than the assignor himself possesses. In such case the paper becomes in the assignee's hands a valid obligation for what it purports on its face to be, although it may have been without consideration or subject to other defense as regards the payee or intermediate holders.

§ 3. **Bill of Exchange—Foreign or Inland.**—A bill of exchange is an unconditional order for the payment of a certain sum of money by the person addressed in it, to the person in whose favor it is drawn.¹ An order may have all the force

¹ **Bill of exchange defined.**

BLACKSTONE.—“An open letter of request from one man to another desiring him to pay a sum named therein to a third person on his account,” 2 Com. 466.

KENT.—“A written order or request by one person to another for the payment of money at a specified time absolutely and at all events,” 3 Kent Com. 74.

BYLES.—“An unconditional written order from A. to B., directing B. to pay C. a sum certain of money therein named,” Byles on Bills 1.

CHITTY.—“An open letter of request from and order by one person on another to pay a sum of money therein mentioned to a third person on his account,” Chitty on Bills 1.

PARSONS.—“A written order for the payment of money,” 1 Parsons on Bills and Notes 52.

CHALMERS.—“An unconditional order in writing for the payment of a sum of money absolutely and at all events,” Chalm. Dig. of Law of Bills, Art. 1.

EDWARDS.—“An open letter directing the person to whom it is addressed to pay the sum therein specified to a third person named in the instrument on account of the writer or person by whom it is drawn,” 1 Edw. on Bills, § 1.

DANIEL.—“An open letter addressed by one person to a second, directing him in effect to pay absolutely and at all events a certain sum of money therein named to a third person or to any other to whom that third person may order it to be paid; or it may be payable to bearer or to the drawer himself,” 1 Daniel on Negot. Instruments 35.

BOUVIER.—“A written order from one person to another directing the person to whom it is addressed to pay to a third person a certain sum of money therein named,” Law Dict.

CALIFORNIA CIVIL CODE.—“An instrument, negotiable in form, by which one, who is called the drawer, requests another called the drawee, to pay a specified sum of money,” Sec. 3171.

ENGLISH BILLS OF EXCHANGE ACT, 1882.—“An unconditional order in writing, addressed by one person to another, signed by the person giving it, requiring the person to whom it is addressed to pay on demand or at a fixed or determinable future time a sum certain in money to or to the order of a specified person, or to bearer,” Sec. 3.

of a bill of exchange as between the immediate parties to it without being recognized by the law merchant as a negotiable bill. This often occurs through additions or restrictions contained in the instrument, directing it to be paid out of a particular fund or in a particular currency or on some contingency. These and other irregularities in form will be considered hereafter.¹

Bills of exchange are either *foreign* or *inland*. Inland bills are drawn and payable in Great Britain (by English law) or (by American law) in the State whose jurisdiction is invoked. If the bill is either drawn or payable in another State or country, it is a foreign bill.² The United States are in this respect foreign to one another, and a bill drawn in one State payable in another is a foreign bill.³

¹ Bill of exchange—Form.

Exchange for £1,000.

NEW YORK, May 1st, 1884.

Six months after date of this first of exchange (second and third unpaid) pay to the order of John Byles one thousand pounds, value received.

HENRY GEORGE.

TO CHARING CROSS BANK,
LONDON.

Bills of exchange, especially inland bills, are often drawn in one part instead of triplicates. In this case the words italicized in the bill are of course omitted.

\$1,000.

NEW YORK, May 1st, 1884.

Ten days after sight pay to Mr. John Byles, or order, one thousand dollars, value received.

Payable at the First National Bank of Philadelphia.

HENRY GEORGE.

TO MESSRS. BROWN & SONS,
PHILADELPHIA.

To these words are frequently added in the body of the bill directions as to place of payment and account to be charged, *e. g.* "payable at the Westminster Bank," "charge the same to my account," "charge to account of A. B."

² Byles 397; Chitty 14; 1 Daniel 8; 1 Edwards § 8; 1 Parsons 55; Story on Bills § 465; 2 Blackstone Com. 466.

³ Buckner v. Finley, 2 Pet. 586 (1829); Dickens v. Bent, 10 Ib. 572; Bank of United States v. Daniel, 12 Ib. 32; Phoenix Bank v. Hussey, 12 Pick. 483; Ocean Nat. Bank v. Williams, 102 Mass. 141 (1869). "We are all clearly of the opinion that bills drawn in one of these States upon persons living in any other of them partake of the character of foreign bills and ought so to be treated. For all national purposes embraced by the federal constitution the States and the citizens thereof are one, united under the same sovereign authority and governed by the same laws. In all other respects the States are necessarily foreign to, and independent of each other," Washington, J., in Buckner v. Finley, *supra*.

§ 4. **Bill of Exchange—Parties.**—The person by whom a bill is drawn is called the *drawer*; the person on whom it is drawn, the *drawee*; the person in whose favor it is drawn, the *payee*. These are not necessarily three distinct persons. A man may draw a bill on himself or make it payable to himself. The drawee becomes an *acceptor* if he accepts the bill. The payee becomes an *indorser* if he transfers the bill by indorsement. One who is not a party to the bill as drawer, drawee or payee may make himself liable upon it as a *guarantor* or as a *surety*, or may accept it “for the honor” of another party and become an *acceptor supra protest*. In foreign law the guarantor of a bill is known as *aval*. The bill itself may suggest persons to whom application shall be made on the drawee’s refusal, *i. e.* “*in case of need*” or “*au besoin*.”

§ 5. **Acceptance—Acceptance Supra Protest.**—The acceptance of a bill of exchange is the drawee’s agreement to pay it when it falls due.¹ An agreement on the part of a stranger to pay the bill at maturity, if the drawee does not, is called an *acceptance for honor* or an *acceptance supra protest*.²

The simplest and most common form of acceptance is by the word “accepted” written across the face of the bill over the acceptor’s signature. A promise to accept often binds the promissor as an actual acceptance.

§ 6. **Presentment for Acceptance—Dishonor—Protest and Notice.**—The holder of a bill may, and in some cases must, present it to the drawee for acceptance. The time and manner of presentment are regulated in most countries and in many of the United States by statute. On the drawee’s

¹ Byles 187; Chitty 318; 1 Parsons 281; 1 Edwards 2606; *Gallagher v. Nichols*, 60 N. Y. 438 (1875); *Ray v. Faulkner*, 73 Ill. 469 (1874). “An engagement to pay the bill in money when due,” *Bouvier Law Dict., in loco*. “A promise to pay it according to its terms,” *Beasley, C. J., in Bonnell v. Mawha*, 8 Vr. 200.

² **Form of acceptance supra protest.**

“Accepted *supra protest* for the honor of A. B. and will be paid at my office if regularly presented when due. JOHN JONES.”

“Accepted S. P., JOHN JONES.”

“Accepted under protest for the honor of A. B. and will be paid for his account if refused when due and regularly protested.” JOHN JONES.”

refusal to accept, the bill should be presented to parties designated "*au besoin*." When acceptance is refused, protest must be made in case of foreign bills, and in the case of all bills notice of dishonor must be given to the other parties who are liable to the holder upon the bill.

Protest is a formal notarial certificate attesting the dishonor of a bill. It should be annexed to the original bill or a copy of it, and should state the time, place and manner of presentment, to whom it was made, what answer was received, and for whom and against whom the bill is protested.¹

The protest may also contain a *notarial certificate* of the notice of dishonor given to the parties entitled to such notice. *Notice of dishonor* is in general necessary, and want of it will discharge other parties from further liability. In some of the United States the notary's certificate of notice of dishonor is itself statutory evidence of the facts stated in it. The certificate should state particularly the time, place and manner of giving the notice. The notice should identify

¹ Byles 262; Benj. Chalm. Dig. Art. 176; Sprague v. Fletcher, 8 Oregon 367; Walker v. Turner, 2 Gratt. 534. "A notarial act made for want of payment of a promissory note, or for want of acceptance or payment of a bill of exchange, by a notary public, in which it is declared that all parties to such instruments will be held responsible to the holder for all damages, exchanges, re-exchanges, etc.," Bouvier Law Dict. "Protest in a more popular sense includes all steps after the dishonor of negotiable paper necessary to charge a party to it," Milligan, J., in *Ocoee Bank v. Hughes*, 2 Coldw. 52 (1865).

Form of protest for non-acceptance.

UNITED STATES OF AMERICA, }
STATE OF NEW JERSEY, } ss.
COUNTY OF HUDSON, }

On the first day of December, A. D. 1884, at the request of A. B. [*holder's name*], I, Charles Henry, a notary public of the State of New Jersey duly commissioned and sworn, did present the original bill of exchange hereto annexed, (or of which a copy is hereto annexed,) to C. D. [*name of drawee*], at his place of business in Jersey City and demanded acceptance, who refused to accept the same. Whereupon, I, the said notary, at the request aforesaid did protest and by these presents do solemnly and publicly protest, as well against the drawer and indorsers of the said bill as against all others whom it may concern for exchange, re-exchange and all costs, damages and interest already incurred and to be hereafter incurred for want of acceptance of the same.

Thus done and protested at Jersey City, in the county aforesaid, in the presence of John Doe and Richard Doe, witnesses.

CHARLES HENRY,
Notary Public.

{ L. S. } *In testimonium veritatis.*

the bill clearly, state its dishonor and inform the party addressed of his liability thereon.¹

§ 7. **Promissory Notes.**—A promissory note is an unconditional promise to pay a certain sum of money to the person in whose favor it is drawn.² As was said of orders for the

¹Form of notice of protest for non-acceptance.

To A. B.:

Please take notice that a bill of exchange drawn by C. D. upon E. F. for one thousand dollars, dated December 1st, 1884, payable three months after sight, in favor of G. H., and indorsed by you, has been presented by me to E. F. at his place of business, No. 10 Broad Street, in Jersey City, and acceptance being duly demanded was refused, whereupon by direction of the holder the same has been this day protested for non-acceptance and you are held liable therefor.

CHARLES HENRY,
Notary Public.

JERSEY CITY, December 15th, 1884.

Form of notary's certificate of notice.

UNITED STATES OF AMERICA, }
STATE OF NEW JERSEY, } ss.
COUNTY OF HUDSON, }

I, Charles Henry, a notary public of the State of New Jersey, duly commissioned and sworn, do hereby certify that on the fifteenth day of December A. D. 1884, due notice of the protest of the annexed bill of exchange (or *bill of exchange of which a copy is hereto annexed*), was served upon the drawer, C. D., personally at his residence, No. 10 Broad Street, in Jersey City; and upon the indorser, A. B., by putting the same into the post office directed to him at New Haven, Conn., said place being the reputed residence of said A. B., and the post office nearest thereto, and said notice being mailed at Jersey City and the postage prepaid.

Witness my hand and official seal, at Jersey City, the fifteenth day of December, A. D. 1884.

CHARLES HENRY,
Notary Public.

{
L. S.
}

As has been said, the substance of this certificate may be incorporated into the certificate of protest.

If the party to be notified was absent, this should appear. If he could not be found, it should appear that diligent inquiry had been made. If formal protest is unnecessary, as in the case of inland bills, and is omitted. Notice of dishonor and the certificate of giving such notice should be substituted for notice of protest.

²Promissory note defined.

BLACKSTONE.—“A plain and direct engagement in writing to pay a sum specified at a time therein limited to a person therein named, or sometimes to his order or often to the bearer at large,” 2 Com. 467.

KENT (following BAYLEY).—“A written promise by one person to another for the payment of money absolutely, at a specified time, and at all events,” 3 Kent Com. 74.

BYLES.—“An absolute promise in writing, signed but not sealed, to pay a certain specified sum at a time therein limited, or on demand, or at sight, to a person therein named or designated, or to his order, or to the bearer,” Byles 5.

CHITTY.—“A promise or engagement in writing to pay a specified sum at

payment of money, a promise may have the effect of a note as between the immediate parties to it and yet lack the requisites of a negotiable promissory note by reason of additions, conditions, restrictions or uncertainties contained in it. The requisite form of a negotiable note will be considered hereafter.¹ The person who gives the note is called the *maker*. The maker and the payee are, in general, the usual and only original parties to a note. It may, however, be drawn payable to the maker's own order and take effect only on indorsement and delivery by him. And it may contain contracts of guaranty by third persons indorsed or written on its face.

a time therein limited or on demand, or at sight, to a person therein named or his order, or to the bearer," Chitty 585.

DANIEL.—"An open promise in writing by one person to pay another person therein named or to his order, or to bearer, a specified sum of money, absolutely and at all events," 1 Daniel 36.

PARSONS. — "In its simplest form, a written promise. A negotiable note is always a promise to pay money," 1 Parsons 14.

STORY.—"A written engagement by one person to pay another person therein named absolutely and unconditionally a certain sum of money at a time specified therein," Story on Prom. Notes § 1.

CHALMERS.—"An unconditioned written promise to pay absolutely and at all events a sum certain in money either to the bearer or to a person therein designated, or his order," Benj. Chalm. Dig., Art. 271.

BOUVIER.—"A written promise to pay a certain sum of money at a future time unconditionally," Law Dict.

See, too, Hall v. Farmer, 5 Denio 485; Walters v. Short, 10 Ill. 252.

CALIFORNIA CIVIL CODE.—"An instrument negotiable in form whereby the signer promises to pay a specified sum of money," Sec. 3244.

ENGLISH BILLS OF EXCHANGE ACT, 1882.—"An unconditional promise in writing made by one person to another signed by the maker, engaging to pay, on demand or at a fixed or determinable future time a sum certain in money, to, or to the order of, a specified person or to bearer," Sec. 83.

¹ Promissory notes—Form.

\$500.

JERSEY CITY, May 1st, 1884.

Thirty days after date I promise to pay to John Jones, or order, five hundred dollars at the First National Bank in Jersey City, value received.

HENRY GEORGE.

\$300.

JERSEY CITY, May 1st, 1884.

On demand we promise to pay to the order of John Jones three hundred dollars, value received.

Payable at No. 1 Broadway, New York.

GEORGE & CO.

\$300.

JERSEY CITY, May 1st, 1884.

Three months after date we promise to pay to the bearer three hundred dollars, value received.

Payable at the First National Bank in Jersey City.

GEORGE & CO.

§ 8. **Checks.**—A check is a bill of exchange drawn on a banker payable on demand.¹ It presupposes funds of the drawer in the hands of the bank or banker drawn upon. In fact, however, the want of such deposit goes to the value rather than to the character of the instrument. The form of a check is that of an inland bill of exchange which designates neither time or place of payment and makes no refer-

¹ Check defined.

BYLES.—“In legal effect an inland bill drawn on a banker payable to bearer (or order) on demand,” Byles 13.

CHITTY.—“A written order or request addressed to persons carrying on the business of bankers and drawn on them by a party having money in their hands, requesting them to pay on presentment to a person therein named, or to bearer, a named sum of money,” Chitty 578.

DANIEL.—“A draft or order upon a bank or banking house purporting to be drawn upon a deposit of funds for the payment, at all events, of a certain sum of money, to a certain person therein named; or to him or his order, or to bearer, and payable instantly on demand,” 2 Daniel 583.

EDWARDS.—“In substance a bill payable on demand,” 1 Edwards, § 19.

PARSONS.—“A brief draft or order on a bank or banking house directing it to pay a certain sum of money,” 2 Parsons 57.

STORY.—“A written order or request addressed to a bank or to persons carrying on the business of bankers by a party having money in their hands, requesting them to pay, on presentment, to another person, or to him or bearer, or to him or order, a certain sum of money specified in the instrument,” Story on Prom. Notes, § 487.

CHALMERS.—“A bill drawn by a customer on his banker payable on demand,” Benj. Chalm. Dig., Art. 254.

COWEN, J., in *Harker v. Anderson*, 21 Wend. 372, “a bill payable on demand.”

SHAW, C. J., in *Bullard v. Randall*, 1 Gray 605, “an order to pay the holder a sum of money at the bank on presentment of the check and demand of the money.”

KENT, C. J., in *People v. Howell*, 4 Johns. 296, “falls within the description of an order for the payment of money.” So, Spofford, J., in *State v. Crawford*, 13 La. An. 300.

EASTMAN, J., in *Barnet v. Smith*, 30 N. H. 256, “substantially the same as an inland bill,” So, Kent, J., in *Cruger v. Armstrong*, 3 Johns. Cas. 5.

DRAKE, J., in *State v. Rickey*, 4 Halst. 312, “a request to pay money to the drawer or his order, *as a right* if he have funds, but in some measure a matter of *favor* if he have not. If there be funds belonging to the drawer it is a demand of them; if not, it is a request of credit to that amount.”

BURRILL.—“A written order or request addressed to a bank or to persons carrying on the business of bankers by a party having money in their hands, requesting them to pay on presentment to a person named therein, or to him or bearer, or order, a named sum of money,” Law Dict. So, Campbell, J., in *Bowen v. Newell*, 5 Sandf. 326, and BOUVIER, Law Dict. *in loco*.

CALIFORNIA CIVIL CODE.—“A bill of exchange drawn upon a bank or banker, or a person described as such upon the face thereof, and payable on demand without interest,” Sec. 3254.

ENGLISH BILLS OF EXCHANGE ACT, 1882, Sec. 73, as in text.

ence to consideration or account to be charged.¹ It is not usual to present checks for acceptance, but a check may be presented to the bank for its certification. Checks are usually certified by the cashier or paying teller of the bank by writing or stamping the word "certified" or "good" on the face of the check with the signature of the certifying officer. This certification is equivalent to the acceptance of a bill.

§ 9. **Bank Notes.**—A bank note or bank bill (as it is sometimes called) is the promissory note of a bank or banker payable to bearer on demand.² It is intended to circulate as money and is generally treated as money. In many respects, as between holder and maker, it is governed by the rules controlling other similar notes. But the right to issue such notes, being virtually the power to create paper money, is in most countries restricted by statute.

§ 10. **Letters of Credit.**—A letter of credit is a request from one person to another to make advances to a third per-

¹Form of Check.

No. 100.

JERSEY CITY, Sept. 1st, 1884.

SECOND NATIONAL BANK.

Pay to the order of Henry James five hundred dollars.

\$500.00.

BROWN & CO.

²Bank notes or bank bills defined.

BYLES.—"A promissory note made by a banker payable to bearer on demand and intended to circulate as money," Byles on Bills 9.

DANIEL.—"The notes of incorporated banks designed to circulate like money and payable to bearer on demand," 2 Daniel 676.

EDWARDS.—"A species of promissory note drawn payable to bearer on demand and for many purposes considered and treated as cash," 1 Edwards, § 20.

PARSONS.—"The promissory note of a bank payable on demand to bearer and therefore negotiable by delivery," 2 Parsons 88.

SAVAGE, C. J., in *Haxton v. Bishop*, 3 Wend. 21, "bank notes are promissory notes"

BUTTERFIELD, J., in *Townsend v. People*, 4 Ill. 326, "a written promise on the part of the bank to pay to the bearer a certain sum of money on demand."

And as to the identity of bank notes and bank bills, see *Low v. People*, 2 Parker Cr. 37; *State v. Wilkins*, 17 Vt. 151; *State v. Hays*, 21 Ind. 176.

They are not *securities for debt* but to all intents and purposes *money*, *Wright v. Reed*, 3 T. R. 554; *Miller v. Race*, 1 Burr. 452; *United States Bank v. Bank of Georgia*, 10 Wheat. 333; *Southcot v. Watson*, 3 Atk. 226. But not so *provincial notes*, *Ellenborough, C. J.*, in *Pickard v. Bank*, 13 East 20.

son on the credit of the one who gives the letter.¹ It generally provides for payments to the payee in such installments as he may desire within a designated period of time and aggregate limit of amount, to be evidenced by the payee's drafts for such sums on the original drawer of the letter of credit in favor of the original drawee or of the person making the payment. It is *general*, if addressed to no person in particular, and *special* if addressed to special persons. In effect, it is an agreement to accept and promise to pay such drafts or generally to repay the payments made on the letter. In form, it is ordinarily drawn for the benefit of a particular person and is not negotiable.

§ 11. **Certificates of Deposit—Due Bills.**—A certificate of deposit is a receipt for money deposited, with a promise to hold it or pay it as may be agreed between the parties. It may or it may not be negotiable. When negotiable, it has in general the effect, if not the form, of a promissory note.

A *due bill* is an acknowledgment of indebtedness with no express promise of payment. It is made a negotiable instrument in some States by statute.

§ 12. **Corporation Bonds—Coupons.**—A corporation bond is an obligation to pay money given under its corporate seal. It is often made negotiable in form by drawing it payable "to the bearer" or to "the order of A. B." Such instruments are held to be "negotiable" so far as regards their

¹Letter of credit defined.

STORY.—"An open letter of request whereby any person (usually a merchant or banker) requests some other person or persons to advance moneys or give credit to a third person named therein for a certain amount and promises that he will repay the same to the person advancing the same or accept bills of exchange drawn on himself for the like amount," Story on Bills § 459.

DANIEL.—"A letter of request whereby one person requests another person to advance money and give credit to a third person and promises that he will repay or guaranty the same to the person making the advancement or accept bills of exchange drawn upon himself for the like amount," 2 Daniel 800.

RAPALJE AND LAWRENCE.—"An authority by one person, A., to another, B., to draw checks or bills of exchange with or without a limit as to amount upon him, with an undertaking by A. to honor the drafts on presentation," Law Dict. *in loco*. See, too, Comstock, J., in *Mechanics' Bank v. N. Y. & N. H. R. R.*, 4 Duer 480; 3 N. Y. 599; and Bronson, J., in *Birckhead v. Brown*, 5 Hall 634.

capacity for transfer by delivery or indorsement and clear of defenses. They are not, however, within the ordinary rules of commercial paper as to grace, protest and notice of dishonor. Nor do they ordinarily fall within the statutes providing for special actions on bills or notes.

The interest on such bonds is generally secured by a *coupon*. These are small notes or due bills for the installments of interest as they mature, printed or written on the same paper as the bond, but capable of being severed from it and transferred without it. They are transferable by indorsement or delivery and have some of the incidents of a negotiable promissory note.

§ 13. **Transfer—Indorsement.**—Commercial paper is transferred by delivery, if payable to bearer—by indorsement if payable to the order of the payee. An *indorsement* is a transfer of the instrument written on the paper or (for want of room) on an attached piece of paper called an *allonge*.¹ It is generally and properly written on the back of the instrument, as its name implies, but may be written elsewhere.

It is either *in blank* or *in full*. General or blank indorsements are made by the holder's signature written across the back of the instrument and making it in effect payable generally, *i. e.* to the bearer. A full or special indorsement is an order by the holder written across the back of the paper directing its payment to the order of another person, *e. g.* "pay to the order of A. B., Brown & Co."

¹**Indorsement defined.**

CHALMERS.—"A writing on a bill signed by the holder ordering the amount to be paid to a person therein designated or to his order or to bearer," Benj. Chalm. Dig., Art. 111.

PARSONS.—"Its exact and legal as well as commercial sense is the transfer of a negotiable note or bill by the indorsement of some person who has a right to indorse," 2 Parsons 1.

DANIEL.—"In its literal sense, writing one's name on the back * * * in its technical sense, writing one's name thereon with intent to incur the liability of a party who warrants payment of the instrument provided it is duly presented to the principal at maturity, not paid by him, and such fact is duly notified to indorser," 1 Daniel 592. As to the meaning of the word and the place for indorsement, see also, 2 Bishop Crim. L. § 570a; Clark v. Sigourney, 17 Conn. 511; Hartwell v. Hemmenway, 7 Pick. 117; Commonwealth v. Buttrick, 100 Mass. 12; Commonwealth v. Spilman, 124 Ib. 327; Higgins v. Bullock, 66 Ill. 37; Rapalje & Lawrence Law Dict. *in loco*

An indorsement may also be *conditional*, directing payment on the happening of a certain event; *absolute*, obliging the indorser to pay without regard to presentment or protest, *e. g.* "protest waived;" *qualified* as to the indorser's obligation, *e. g.* "without recourse;" or *restrictive* as to the indorsee's use, *e. g.* "pay to A. B. for the use of C. D." The effect of an indorsement is not merely to transfer the instrument and the power to sue on it. It also contains by implication of law an undertaking to pay the instrument on due notice of dishonor, together with certain warranties as to title, genuineness and validity of the paper as well as capacity and solvency of the parties.¹

§ 14. **Holder**—"Bona Fide Holder for Value."—One who rightfully receives a bill or note either by original delivery or subsequent transfer is termed the *holder*.² If the transfer is made before the maturity of the paper for valuable consideration to a purchaser having no notice of defenses that existed between the original parties or have subsequently

¹ "Negotiation means the transfer of a bill in the form and manner prescribed by the law merchant with the incidents and privileges annexed thereto, *i. e.*,

"1. The transferee can sue all the parties to the instrument in his own name.

"2. The consideration for the transfer is *prima facie* presumed.

"3. The transferrer can under certain conditions give a good title although he has none himself.

"4. The transferee can negotiate the bill with the like privileges and incidents," Benj. Chalm. Dig., Art. 106.

"To negotiate a bill of exchange, promissory note, check, or other negotiable instrument for the payment of money, is to transfer it for value by delivery or indorsement," Rapalje & L. Law Dict.

"The term negotiate in its enlarged signification applies to any written security which may be transferred by indorsement or delivery so as to vest in the indorsee the legal title so as to enable him to maintain a suit thereon in his own name," Scott, J., in *Odell v. Gray*, 15 Mo. 342.

² BYLES.—"Holder is a general word applied to any one in actual or constructive possession of the bill and entitled at law to recover or receive its contents from the parties to it," Byles 2.

PARSONS.—"By the holder of negotiable paper is meant in law the owner of it, for if it be in his possession without title or interest he is in general considered only as the agent of the owner," 1 Parsons 253.

DANIEL.—"Any one who has acquired it in good faith for a valuable consideration from one capable of transferring it," 1 Daniel 716.

CHALMERS.—"The person in possession of a bill who by the law merchant is entitled to enforce the payment thereof. It includes equally payee, indorsee or bearer," Benj. Chalm. Dig., Art. 3.

arisen, such holder is called a "*bona fide* holder for value."¹ As such he takes the instrument free from defenses which were available against his immediate indorser or prior parties.

The holder is generally designated in a bill or note by the word "bearer" or "order," any rightful holder by delivery being intended by the former term, and any rightful holder by indorsement being intended by the latter.

§ 15. **Consideration—Accommodation.**—Commercial paper requires, in general, such consideration as other contracts. This consideration is usually expressed in the body of the instrument by the words "value received." The law merchant raises a presumption of consideration in favor of bills, notes, checks, acceptances and indorsements. The consideration may be, and often is, the *accommodation* or procurement of credit for another party to the paper.² This is a valid consideration applicable alike to all parties and binding upon the accommodation maker, drawer, acceptor or indorser even in favor of a holder who took the paper with full knowledge of its accommodation character. Such knowledge does not affect his character as a "*bona fide* holder."

§ 16. **Maturity—Grace.**—The maturity of a bill or note is indicated in the instrument itself either by making it payable a certain number of days or months or

¹ CHALMERS.—"A holder for value who at the time he becomes the holder and gives value is really and truly without notice of any facts which if known would defeat his title to the bill," Benj. Chalm. Dig., Art. 85.

PARSONS.—"He who acquires the paper in good faith, without notice or knowledge of defenses or circumstances which should put him on inquiry, for valuable consideration from one capable of transferring the paper," 1 Parsons 254.

² PARSONS.—"Accommodation paper is the loan of credit for the benefit of the borrower without restriction as to the use," 2 Parsons 27. So, Dunn v. Weston, 71 Me. 270; Lord v. Ocean Bank, 20 Penna. St. 384.

DANIEL.—"An accommodation bill or note is one to which the accommodating party has put his name without consideration for the purpose of accommodating some other party who is to use it and is expected to pay it," 1 Daniel 191.

CHALMERS.—"'Accommodation bill' means a bill whereof the acceptor (i. e., the principal debtor on the instrument) is substantially a mere surety for some other person who may or may not be a party thereto. 'Accommodation party' means a person who has signed a bill as drawer, indorser or acceptor without receiving value *and* for the purpose of lending his name to some other person as a means of credit," Benj. Chalm. Dig., Art. 90.

“usances” “after date” or “after sight,” or “on demand,” or “at sight.”

Where the bill runs a certain time “*after sight*,” it must be presented for acceptance, and whether accepted or dishonored, the time will run from such presentment. If payable “*on demand*” or “*at sight*,” it matures when presented, unless days of grace are allowed. Some States have determined by statute the maturity of bills and notes payable “on demand,” fixing it at four or six months. If no time of payment is expressed the paper is payable on demand. A *usage* is a customary period for payment fixed by custom of the place of drawing and of payment. The term is not used in English or American bills.

Days of grace, generally three in number, are allowed in many countries after the expiration of the time limited for payment in the instrument.¹ In such case the bill or note falls due, and should be presented for payment, on the last day of grace. The allowance of grace is not made on checks or bank bills.

§ 17. **Presentment for Payment—Payment.**—A bill or note must be presented for payment promptly at its maturity and a failure to make such presentment will discharge parties secondarily liable, *e. g.* the drawer and indorsers, but will not affect those liable in the first instance, *i. e.* the acceptor of a bill or maker of a note. If the paper is taken up and paid by a party not himself ultimately liable, the payment will not extinguish the instrument, but it will be kept alive as against prior parties.

§ 18. **Dishonor—Protest and Notice.**—When payment of a bill, note or check is refused on due presentment at maturity, the paper is said to be dishonored. If it is a foreign bill of

¹“In the law of bills days of grace are a period allowed in many countries to the drawer or acceptor of a bill to pay after the due date, originally as a favor but now as a matter of right,” Rapalje & L. Law Dict. So, *Ferris v. Saxton*, 1 South. 17; 1 Daniel 550.

BOUVIER.—“Certain days allowed to the acceptor of a bill or the maker of a note in which to make payment, in addition to the time contracted for by the bill or note itself,” Law Dict.

exchange, it must then be protested. And in every case notice of the non-payment of the instrument must be given immediately as in the case of protest and notice for non-acceptance.¹

§ 19. **Action—Procedure—Damages.**—In many countries an action of summary character is given by statute to the holder of a bill of exchange. In many of the United States actions on bills and notes have been simplified by statutes enabling the holder to prosecute all prior parties in one action and giving the benefit of the judgment rendered in such action to a defendant who pays it off and is entitled to recover against other and prior parties.

Special damages are also sometimes allowed, including *re-exchange*.² And in many States the rate of damages to be allowed over and above interest is fixed by statute.

¹For forms of protest and notice for non-payment see § 6, substituting *payment* for *acceptance* wherever it occurs.

²**Re-exchange defined.**

KENT.—“The purchase of a new bill on the country where the drawer of the protested bill lives,” 3 Kent Com. 116.

STORY.—(In the commercial sense) “the amount for which a bill of exchange can be purchased in the country where the acceptance is made, drawn upon the drawer or indorser in the country where he resides, which will give the holder of the original bill a sum exactly equal to the amount of the bill at the time when it ought to be paid or when he is able to draw the re-exchange bill together with his necessary expenses and interest,” Story on Bills § 400.

BYTES.—“The difference in the value of a bill occasioned by its being dishonored in a foreign country in which it was payable. The existence and amount of it depend on the rate of exchange between the two countries,” Bytes 418.

DANIEL.—“The amount for which a bill of exchange may be purchased in the country where the original bill is payable, drawn upon the drawer in the country where he resides, which will give the holder a sum exactly equal to the amount of the original bill at the time it ought to be paid, or when he is able to draw the re-exchange bill, together with expenses and interest, for that is precisely the sum which the holder is entitled to receive and which will indemnify him for its non-payment,” 2 Daniel 452.

RAPALJE AND L. LAW DICT.—“The damages which the holder of a bill of exchange sustains by its being dishonored in a foreign country where it was made payable.”

CHALMERS.—“The loss resulting from the dishonor of a bill of exchange in a country different from that in which it was drawn or indorsed,” Benj. Chalm. Dig., Art. 221.

But a bill drawn in South Carolina on a citizen of Pennsylvania is a South Carolina contract, although it may be a foreign bill.¹ And it is to be remembered that the drawing, accepting and indorsing of bills and notes are all distinct contracts and may have separate localities and be governed by various laws.²

§ 21. **Lex Loci Contractus Governs Liability—Form.**—In general, the rule of other contracts applies to commercial paper. The law of the place where the contract is made governs the contract, unless such law is against the public morals or policy of the State where it is to be enforced.³ It controls the *liability* of the maker of a promissory note,⁴ although the note may afterward be transferred in another State.⁵ The rights and the liability of the drawer of a bill of exchange are governed by it.⁶ The liability of one who accepts, or agrees to accept, a bill is governed by the law of the place of acceptance.⁷ So, the liability of a surety depends on the place of his contract.⁸

The law of the place of contract regulates the *formalities*

¹ *Hazelhurst v. Kean*, 4 Yeates 19 (1803). But a note made in Tennessee by a citizen of that State to a citizen of Alabama at a rate of interest lawful in Alabama and not in Tennessee, has been sustained as an Alabama contract, *Brown v. Gardner*, 4 Lea 145 (1879).

² Byles 406; *Gibbs v. Fremont*, 9 Exch. 31; *Greathead v. Walton*, 40 Conn. 226 (1873).

³ Byles 402; 2 Parsons 320; Story on Prom. Notes § 155; Story on Conf. L. Laws § 242; 1 Daniel 828. That a married woman may become surety on a note in Illinois, although differing from, is not against the public policy of New Jersey, *Wright v. Remington*, 12 Vr. 48, affirmed 14 *Id.* 451 (1879). On the other hand, a New Jersey court will not enforce a New York contract secured by a New Jersey mortgage against the policy of the New Jersey statutes prohibiting stock gambling, *Flagg v. Baldwin*, 11 Stew. 21^a (1884).

⁴ *Davis v. Clemson*, 6 McLean 622 (1855), unless payable elsewhere.

⁵ *Ory v. Winter*, 4 Mart. (N. S.) 277 (1826).

⁶ *Thorp v. Craig*, 10 Iowa 461 (1860). But it has been held that the damages for which the drawer of a bill of exchange is liable must be determined by the place where the bill was drawn, that being presumably the intended place of payment of a bill drawn to his own order in Boston on London and negotiated by him in New York, *Ex parte Heidelback*, 2 Lowell 526 (1876).

⁷ *Boyce v. Edwards*, 4 Pet. 111 (1830). So, too, *Scudder v. Union Nat. Bank*, 1 Otto 406 (1875). But see *Lonsdale v. Lafayette Bank*, 18 Ohio 126 (1849).

⁸ *Long v. Templeman*, 24 La. An. 561 (1872). And this rule is not affected by a subsequent change of domicile on the part of the principal, *Id.*

of its execution.¹ Thus, the sufficiency of a parol acceptance is governed by the law of the place of acceptance.² In like manner, where a person in New York writes to another in Michigan, authorizing the latter to draw on him bills payable in New York, this authority is governed by New York law and amounts to an acceptance there.³ So, an indorsement in blank, made in France and invalid there, is of no force anywhere.⁴

§ 22. **Lex Loci Contractus Governs Validity—Effect.**—The *validity* of a contract is determined by the law where it is made,⁵ unless the provisions of the foreign law are repugnant to those of the forum, in which case they will not be enforced there.⁶ But an I. O. U., given for a gaming consideration and valid where made, has been enforced as valid in England.⁷ A contract in Massachusetts for the sale of liquor in New Hampshire and its delivery there has been held to be a New Hampshire contract and illegal and void by the laws of that State.⁸ But a contract in New Jersey for the sale of personal property then situate in Pennsylvania is a New Jersey contract and must comply with the New Jersey statute of frauds.⁹

¹ Daniel 830; Story on Bills § 131; Story on Prom. Notes § 158; Hyde v. Goodnow, 3 N. Y. 266 (1850); Evans v. Anderson, 78 Ill. 558 (1875); Dacosta v. Davis, 4 Zab. 319 (1854); Wood v. Gibbs, 35 Miss. 559 (1858).

² Mason v. Dousay, 35 Ill. 424 (1864). So, Bank of Rutland v. Woodruff, 34 Vt. 89 (1861), where the drawee resided in a State not recognizing such acceptances, but accepted the bill by his agent in a State where such acceptance was valid. So, too, Scudder v. Union Nat. Bank, 1 Otto 406 (1875), where the drawee was a Missouri firm, but the bill was accepted by a member of the firm then in Illinois.

³ Bissell v. Lewis, 4 Mich. 450 (1857).

⁴ Byles 403; Trimbey v. Vignier, 1 Bing. N. C. 15; S. C., 4 M. & S. 695; 6 C. & P. 25; but see Wynne v. Jackson, 2 Russ. 51.

⁵ Story on Prom. Notes § 155; Story on Bills § 131; Byles 403; Atwater v. Walker, 1 C. E. Gr. 42; S. C., 2 McCart. 502 (1863); Armour v. McMichael, 7 Vr. 92, 94 (1872); Dolman v. Cook, 1 McCart. 56, 62 (1861); Andrews v. Torrey, *Id.* 355, 357 (1862); Cotheal v. Blydenburgh, 1 Halst. Ch. 17 (1845); S. C., *Id.* 631 (1847); Woodruff v. Hill, 116 Mass. 310 (1874); Carnegie v. Morrison, 2 Mete. 381, 397 (1841); Bissell v. Lewis, 4 Mich. 450, 459 (1857); Fitch v. Remer, 8 Am. Law Reg. 654 (1860); Wood v. Gibbs, 35 Miss. 559 (1858); McDougald v. Rutherford, 30 Ala. 253 (1857).

⁶ King v. Servia, 69 N. Y. 24 (1877).

⁷ Byles 404; Quarrier v. Colston, 12 L. J. Ch. 57; 1 Phill. 147.

⁸ Wilson v. Stratton, 47 Me. 120 (1860).

⁹ Dacosta v. Davis, 4 Zab. 319 (1854).

In like manner, the *effect* of a contract is governed by the law of the place where it is made.¹ This rule has been applied to the questions of what grace shall be allowed,² and what interest paid.³ And the fact that a note made in one State is secured by a mortgage on lands lying in another State will not change this rule.⁴ The acceptor of a bill is governed in his turn as to interest to be paid by the law of the place of acceptance.⁵

But the place of a contract is itself not always apparent. Thus, a bill, payable in Massachusetts and accepted there for the drawer's accommodation and discounted in New York at a usurious rate, is really a New York contract and void by New York law, even though the acceptor held collaterals of the drawer for his security.⁶ But where a bill is drawn in one State on a citizen of another State and by implication is payable in the latter, if it is valid in the State where it is drawn, it will not be held usurious by the law of the place of payment.⁷ If, however, a New York contract and loan, usurious there, is completed in Nebraska by a note given there, payable in New York, and a mortgage on lands in Nebraska, the fact of the delivery of the

¹Story on Prom. Notes § 155; Story on Bills § 131; 1 Daniel 830; Hyde v. Goodnow, 3 N. Y. 266 (1850); Evans v. Anderson, 78 Ill. 558 (1875); Kanaga v. Taylor, 7 Ohio St. 134, 142 (1857); Armendiax v. Sana, 40 Tex. 291 (1874); Arnold v. Potter, 22 Iowa 194 (1867); Carnegie v. Morrison, 2 Mete. 381, 397 (1841); Bissell v. Lewis, 4 Mich. 450, 459 (1857); Steele v. Curle, 4 Dana 381 (1836); Stevens v. Norris, 30 N. H. 466, 470 (1855); Wood v. Gibbs, 35 Miss. 559 (1858); McDougald v. Rutherford, 30 Ala. 253 (1857).

²Burnham v. Webster, 19 Me. 232 (1841).

³Bytes 406; Story on Prom. Notes § 166; Hunter v. Blodgett, 2 Yeates 480 (1799); Varick v. Crane, 3 Gr. Ch. 128 (1837); Jewell v. Wright, 30 N. Y. 259 (1864); Merchants' Bank v. Griswold, 72 N. Y. 472 (1878); Pugh v. Cameron, 11 W. Va. 523 (1877); Second National Bank v. Smoot, 2 MacArth. 371 (1876). And this has been recently held to be the rule in the New York Court of Appeals, in sustaining a note payable in another State and given in payment of a loan made in that State, Sheldon v. Haxtun, 2 N. Y. Cond. Rep. 203 (1883); 91 N. Y. 124.

⁴DeWolf v. Johnson, 10 Wheat. 367 (1825); Chase v. Dow, 47 N. H. 405 (1867).

⁵Bytes 406; Cooper v. Earl Waldegrave, 2 Beav. 282; Allen v. Kemble, 6 Moo. P. C. 314.

⁶Akers v. Demond, 103 Mass. 318 (1869).

⁷Bank of Georgia v. Lewin, 45 Barb. 340 (1865); Balme v. Wombough, 38 Barb. 352 (1862); Chapman v. Robertson, 6 Paige 627, 634 (1837); Pratt v. Adams, 7 Ib. 615, 632 (1839).

papers and the situation of the mortgaged land in Nebraska will not save the note from being rendered void by the laws of New York.¹

§ 23. **Presumption as to Intent of Parties.**—In general, a contract is presumed to have been made with reference to the laws of the place where it is made and with knowledge of those laws.² And this rule applies to contracts made in another place as well as to those made in the place where the action is brought.³

§ 24. **Delivery Fixes Place of Contract.**—When a contract in writing is completed, the place of its delivery is the place where it is held to have been made.⁴ The delivery is the completion of the contract. It therefore controls the date, if a different one is expressed, as well as the mere place of drawing the instrument.⁵ So, if a note is dated and signed in blank in one State and sent into another State to be filled up and delivered, the law of the latter State will govern it.⁶ So, if it is dated and signed in one State by one of several makers and afterward signed and delivered by the others in another State, it is considered to be a contract of the latter State.⁷

¹Sands v. Smith, 1 Neb. 108.

²1 Edwards § 217; 2 Parsons 318.

³Chapin v. Dobson, 78 N. Y. 74 (1879).

⁴1 Daniel 831; 2 Parsons 327; Freese v. Brownell, 6 Vr. 285 (1871); Campbell v. Nichols, 4 Vr. 81 (1868); Jewell v. Wright, 30 N. Y. 259 (1864); Hyde v. Goodnow, 3 N. Y. 266 (1850); Bell v. Packard, 69 Me. 105 (1879); Gay v. Rainey, 89 Ill. 221 (1878); Gallaudet v. Sykes, 1 MacArth. 489 (1874); Chapman v. Cottrell, 34 L. J. Exch. 186 (1865); Second National Bank v. Smoot, 2 MacArth. 371 (1876); Lawrence v. Bassett, 5 Allen 140 (1862); Evans v. Anderson, 78 Ill. 558 (1875). So, Matthews, J., in Whiston v. Stodder, 8 Martin 95 (1820), the place "where the final assent may have been given." But where a loan is made in one State and the note for it given in another, the former may be the place of contract, Sands v. Smith, 1 Neb. 108.

⁵In re Conrad, 1 Leg. Gaz. Rep. 284 (1871); Hyde v. Goodnow, 3 N. Y. 266 (1850); Davis v. Clemson, 6 McLean 622 (1855); Davis v. Coleman, 7 Ired. 424 (1847); Findlay v. Hale, 12 Ohio St. 610 (1861); Second Nat. Bank v. Smoot, 2 MacArth. 371 (1876); Connor v. Donnell, 55 Tex. 167 (1881). Especially if payable in the same State where it is delivered, Cook v. Moffat, 5 How. 295 (1846).

⁶Fant v. Miller, 17 Gratt. 47 (1866). The place of making need not appear on the face of the note, Evans v. Anderson, 78 Ill. 558 (1875).

⁷Hart v. Wills, 52 Iowa 56 (1879). So as to the statute requiring actions on foreign contracts to be brought within six months, Read v. Edwards, 2 Nev. 262 (1866); Alcaldia v. Morales, 3 Ib. 132 (1867).

In like manner, a note for an insurance policy, made in Ohio and sent to New York by mail to take effect there on delivery of the policy, is a New York note.¹ And a note drawn in Massachusetts, payable to a person resident in Maine and sent to him by mail, will be binding by the law of Maine on a married woman who signed it in Massachusetts, although she would not have been bound by Massachusetts law.²

On the other hand, where a note was executed and delivered in South Carolina, and afterward signed by a surety in North Carolina, no rate of interest being expressed, the rate for which the surety was liable was held to be that of South Carolina, although higher than that of his own State.³

§ 25. If a surety, after indorsing the note, returns it to the place where it was originally executed and dated, his indorsement will be a contract of that place.⁴ So, an accommodation indorsement written in one State and delivered in another is governed by the law of the latter.⁵ And an acceptance, given in Washington to a bill drawn in New York, and returned to New York and negotiated there, is a New York acceptance.⁶ This is true also of accommodation acceptances;⁷ even though the bill be expressly payable in the place of its acceptance.⁸

¹ *Hyde v. Goodnow*, 3 N. Y. 266 (1850). So, *Mott v. Wright*, 4 Biss. C. C. 53 (1865).

² *Bell v. Packard*, 69 Me. 105 (1879).

³ *Houston v. Potts*, 64 N. C. 33 (1870).

⁴ *Stanford v. Pruet*, 27 Ga. 243 (1859).

⁵ 1 Daniel 833; Wharton Conf. L. § 459; 2 Parsons 380; *Cook v. Litchfield*, 5 Sandf. 330 (1851); *Stanford v. Pruet*, 27 Ga. 243 (1859); *Davis v. Clemson*, 6 McLean 622 (1855); *Young v. Harris*, 14 B. Mon. 556 (1854); *Gay v. Rainey*, 89 Ill. 221 (1878). See, too, *Overton v. Bolton*, 9 Heisk. 762 (1872), which case was, however, decided on the point of warranty of validity of the note by indorsement.

⁶ *Gallaudet v. Sykes*, 1 MacArth. 489 (1874).

⁷ First National Bank of New York *v. Morris*, 1 Hun 680 (1874); *Bank of Georgia v. Lewin*, 45 Barb. 340 (1865); *Bowen v. Bradley*, 9 Abb. (N. S.) 395 (1870); *Dickinson v. Edwards*, 77 N. Y. 573 (1879), affirming 13 Hun 405.

⁸ *Tilden v. Blair*, 21 Wall. 241 (1874). "The place of payment," says Strong, J., p. 247, "was doubtless designated for the convenience of the acceptors or to facilitate the negotiation of the draft." The Illinois statute of Feb. 12th, 1857, expressly provides for discount of such paper at Illinois rates.

But to this rule as to the place of delivery being the place of contract official bonds executed in pursuance of an act of congress form an exception and are considered as executed at the seat of government and not subject to local law.¹

§ 26. **Place of Contract—Indicated by Date.**—The place intended for the making of a note or drawing of a bill is generally shown by its date. Thus, where a bill was dated in Philadelphia leaving day and year blank and these were filled up in England, it was held that the intention was to make a Pennsylvania contract and that the Pennsylvania law governed it.² So, a note made in Connecticut but dated in Louisiana is *prima facie* payable there and is accordingly governed by Louisiana law.³ So, where a note was dated in the State where the maker resided, but made elsewhere and no place of payment was designated, and the designated rate of interest was legal in the place of date but usurious in the place of making, the note was presumed to be payable where it was dated and therefore valid.⁴ A *bona fide* holder cannot of course be prejudiced by the fact that the note was actually negotiated in a place where it was usurious, if dated in a place where it would have been valid.⁵

§ 27. **Place of Contract—Indicated by Situation of Land Security—Residence of Parties.**—Where a loan is secured by mortgage on land lying in another State, a bond or note and mortgage at a rate of interest valid where they are given will not be rendered usurious by the law of the place where

¹Cox v. United States, 6 Pet. 203; Andrews v. Pond, 13 Ib. 77; Bell v. Bruin, 1 How. 182; S. C., 9 How. 277; Fanning v. Consequa, 17 Johns. 511.

²Lennig v. Ralston, 23 Penna. St. 137 (1854); Longee v. Washburn, 16 N. H. 134 (1844). See, too, Snaith v. Mingay, 1 M. & S. 87.

³Tillotson v. Tillotson, 34 Conn. 335 (1867). In this case the maker's place of business was also in Louisiana.

⁴Bullard v. Thompson, 35 Tex. 313 (1872). Especially if discounted as well as dated in such other State, Second Nat. Bank v. Smoot, 2 MacArth. 371 (1876).

⁵1 Daniel 833; 1 Parsons 57; Second Nat. Bank v. Smoot, 2 MacArth. 371 (1876); Lennig v. Ralston, 23 Penna. St. 139 (1854); Barker v. Sterne, 9 Exch. 684; Towne v. Rice, 122 Mass. 67 (1877); or that the loan for which it was given was made elsewhere, Potter v. Tallman, 35 Barb. 182 (1861).

the land lies.¹ This is plainly the case where the mortgage is merely collateral for a loan made and used in another State and not on the land mortgaged.² But if the money is employed on the land mortgaged, and borrowed for that purpose, it has been held that the *lex loci rei sitæ* should apply.³

In general, if a note is made in one State but payable in another and secured by mortgage of lands in such other State, the laws of the latter State should govern the computation of interest.⁴ So, a note made and payable in New York for a New York loan, but secured by a mortgage on Nebraska lands, and dated in Nebraska, has been held to be a New York contract and governed by New York law as to usury, although it may be void by that law.⁵ So, a note made and payable in South Carolina is governed by the law of that State, although made by a resident of another State and secured by a mortgage of lands lying in the latter State.⁶ But where a note is made between citizens of different States and secured by a mortgage on lands in the place where the maker resided, the parties may lawfully contract for a rate of interest valid there, although the note was both made and payable in a third State.⁷ So, a note held by a Wisconsin corporation and secured by a Wisconsin mortgage will be governed as to usury by Wisconsin law, though attached as

¹DeWolf v. Johnson, 10 Wheat. 367 (1825); Dolman v. Cook, 1 McCart. 56, 62 (1861); Varick v. Crane, 3 Gr. Ch. 128 (1837); Andrews v. Torrey, 1 McCart. 355, 357 (1862); Cotheal v. Blydenburgh, 1 Halst. Ch. 17 (1845); S. C., *Ib.* 631 (1847). Especially if the maker's domicile is in the State where the contract is made, Chase v. Dow, 47 N. H. 405 (1867).

²1 Daniel 850; Wharton Confl. Laws § 510; DeWolf v. Johnson, 10 Wheat. 367, 383 (1825); Newman v. Kershaw, 10 Wis. 333 (1860); Atwater v. Walker, 1 C. E. Gr. 42 (1863); Dolman v. Cook, 1 McCart. 56 (1861); Andrews v. Torrey, *Ib.* 355 (1862); Stapleton v. Conway, 3 Atk. 727 (1750); S. C., 1 Ves. 427; Cope v. Alden, 53 Barb. 350 (1869).

³1 Daniel 850; Story Confl. Laws § 305; Wharton Confl. Laws § 510; Connor v. Earl of Bellmont, 2 Atk. 382.

⁴Little v. Riley, 43 N. H. 109 (1861).

⁵Sands v. Smith, 1 Neb. 108. On the other hand, a mortgage which is usurious where made has been held to be valid if in conformity with the laws of the place where the land lies, Stapleton v. Conway, *supra*; Chapman v. Robertson, 6 Paige 627 (1837).

⁶Goodrich v. Williams, 50 Ga. 425 (1873).

⁷Arnold v. Potter, 22 Iowa 194 (1867); Newman v. Kershaw, 10 Wis. 333 (1860).

collateral to one of the company's own bonds payable in New York and negotiated there.¹

So far as regards presumptions arising from place of residence or business, it is presumed that a contract is made at the maker's place of business rather than at his residence, where they are in different States.²

§ 28. *Lex Loci Solutionis*—Governs Validity, Obligation and Construction.—Where a contract is made with reference to the place of performance, as is generally the case, the law of the place of contract yields to the law of the place of performance.³ If a place of performance is expressed, it is presumed that the contract was made with reference to the law of that place.⁴ It is presumed also that this law was known to the contracting parties.⁵ And this rule applies to commercial paper. The law of the place of payment governs the validity, nature, obligation and interpretation of such paper.⁶

Where the place of payment is different from the place of making, the parties may stipulate that the contract shall be

¹ *Lyon v. Ewings*, 17 Wis. 63 (1863).

² *Varick v. Crane*, 3 Gr. Ch. 128 (1837).

³ *Robinson v. Bland*, 2 Burr. 1077; *Andrews v. Pond*, 13 Pct. 65 (1839); *Stricker v. Tinkham*, 35 Ga. 176 (1866); *Prentiss v. Savage*, 13 Mass. 21 (1816); *Goddin v. Shipley*, 7 B. Mon. 575 (1847); *Fanning v. Consequa*, 17 Johns. 511 (1820); *Hyde v. Goodnow*, 3 N. Y. 266 (1850); *Thorp v. Craig*, 10 Iowa 461 (1860); *Hunt v. Standart*, 15 Ind. 33 (1860); *Freese v. Brownell*, 6 Vr. 285 (1871); *Agricultural National Bank v. Sheffield*, 4 Hun 421 (1875); *Bank of Rutland v. Woodruff*, 34 Vt. 89 (1861); *Shillito v. Reineking*, 30 Hun 345 (1883).

⁴ 1 Edwards § 217; 2 Parsons 320; Story on Prom. Notes § 165; 1 Daniel 840; *Short v. Trabue*, 4 Metc. 299 (Ky. 1863); *Arnold v. Potter*, 22 Iowa 194 (1867); *Newman v. Kershaw*, 10 Wis. 333 (1860); *Martin v. Martin*, 1 Sm. & M. 176 (1843); *City of Aurora v. West*, 22 Ind. 88 (1864); *Smith v. Muncie National Bank*, 29 Ind. 153 (1867); *Allen v. Bratton*, 47 Miss. 119 (1872); *Mason v. Dunsay*, 35 Ill. 424 (1864); *Fordyce v. Nelson*, 91 Ind. 447 (1883). So, too, a carrier's contract for transportation of baggage, *Curtis v. D. L. & W. R. R.*, 74 N. Y. 116 (1878). On the other hand, if a note is made by a resident of Indiana to a resident of Ohio, dated in Indiana and payable at —, the intention of the parties as to place of performance, is a question for the jury, *Shillito v. Reineking*, 30 Hun 345 (1883).

⁵ 2 Parsons 326; *Freese v. Brownell*, 6 Vr. 287 (1871).

⁶ Byles 402; 2 Parsons 345; Story on Prom. Notes § 165; *Robinson v. Bland*, 2 Burr. 1077; S. C., 1 W. Bl. 256; *Rothschild v. Currie*, 1 Q. B. 43; *Allen v. Kemble*, 6 Moo. P. C. 314; *Chapman v. Robertson*, 6 Faige 627 (1837); *Van Zant v. Arnold*, 31 Ga. 210 (1860); *Scudder v. Union Nat. Bank*, 1 Otto 406 (1875). But see *Joslin v. Miller*, 14 Neb. 91 (1883), where the

governed by the law of either place.¹ Thus, they may make the rate of interest follow the law of their own residence, and if valid there, it will be sufficient, though usurious by the law of the place of payment.² If part of a contract is to be performed in one State and part in another, each part should be governed by the law of the place where it is to be performed.³ Thus, an indorsement for the accommodation of the payee of a note may be governed by the law of the place of indorsement, and the maker's contract with the payee by the law of the place where the note was made.⁴

In general, the contract of the maker of a note or the drawer of a bill of exchange is governed by the place where it is made payable.⁵ And this is true of bills of exchange,⁶ municipal bonds,⁷ drafts,⁸ and checks.⁹ So, the law of the place of payment will determine the acceptor's liability, if such place is expressed in the instrument.¹⁰ But if the bill

place of contract was held to govern the validity. And drawing and dating a bill in Tennessee upon a drawee in Louisiana, under cover of an Arkansas charter, for the purpose of evading a Tennessee statute against private banking, will not make it a valid bill, *Davidson v. Lanier*, 4 Wall. 447 (1866).

¹ *Newman v. Kershaw*, 10 Wis. 333 (1860); *Arnold v. Potter*, 22 Iowa 194 (1867). Where it is expressly payable in another State at a rate of interest valid there, the law of that State will determine its validity, *Pomeroy v. Ainsworth*, 22 Barb. 118 (1856); *Brown v. Gardner*, 4 B. J. Lea 145 (1879).

² *Wharton Conf. Laws* § 510 n.; *Richards v. Globe Bank*, 12 Wis. 692 (1860); *Vliet v. Camp*, 13 Wis. 198 (1860).

³ *Pomeroy v. Ainsworth*, *supra*.

⁴ *Greathead v. Walton*, 40 Conn. 226 (1873).

⁵ 1 Edwards § 228; 2 Parsons 335; *Story on Prom. Notes* § 172; *Hunt v. Standart*, 15 Ind. 33 (1860); *Allen v. Bratton*, 47 Miss. 119 (1872); *Thompson v. Ketcham*, 4 Johns. 285 (1809); *Davis v. Clemson*, 6 McLean 622 (1855); *Cook v. Moffat*, 5 How. 295, as to discharge in insolvency; *Campbell v. Nichols*, 4 Vr. 81 (1868), as to usury. So, *Johnston v. Gawtry*, 11 Mo. App. 332 (1882), and *Murphy v. Collins*, 121 Mass. 6 (1876), where the note was delivered and payable in the same place; and *Little v. Riley*, 43 N. H. 109 (1861), where it was secured by a mortgage on lands situate in the place named for payment.

⁶ *Bright v. Judson*, 47 Barb. 29 (1866); *Mason v. Dousay*, 35 Ill. 424 (1864).

⁷ *City of Aurora v. West*, 22 Ind. 88 (1864).

⁸ *Orono Bank v. Wood*, 49 Me. 26 (1860).

⁹ *Hibernia National Bank v. Lacombe*, 84 N. Y. 367 (1881).

¹⁰ Byles 405; 1 Daniel § 52; 1 Edwards § 228; *Freese v. Brownell*, 6 Vr. 285 (1871); *Frazier v. Warfield*, 9 Sm. & M. 220 (1848); *Bainbridge v. Wilcocks*, 1 Balw. 536 (1832); *Don v. Lippman*, 5 Cl. & Fin. 1 (1837); *Cooper v. Earl of Waldegrave*, 2 Beav. 282 (1840); *Barney v. Newcomb*, 9 Cush. 46 (1851); *Bright v. Judson*, 47 Barb. 29 (1866).

is payable generally without designation of a place of payment, this will not be the rule.¹

§ 29. **Lex Loci Solutionis Governs Indorsement.**—In like manner, an indorsement made in accordance with English law will be held sufficient there, if the bill of exchange is payable in England.² So, the law of Massachusetts governs the indorsement of a Massachusetts note payable there, though the indorsement was made in New York.³ And the maker will be governed by the law of the place of payment, though the note after being there indorsed was sent by mail to another State, and there delivered in payment for goods purchased.⁴

§ 30. **Lex Loci Solutionis Determines Interest—Usury.**—The law of the place of payment as to interest is also presumed to be known and intended by the parties.⁵ The place intended for performance of a contract is in general the place that determines the rate of interest to be computed on the instrument.⁶ But if the legal rate is higher at the place of payment than at the place of contract, the former may be elected by the parties.⁷ And such higher rate, when so chosen by the parties, may be enforced in the State where

¹ Byles 405; *Don v. Lippman*, 5 Cl. & Fin. 1; *Sprowle v. Legge*, 2 D. & R. 15; 1 B. & C. 16; 2 Stark. 156; *Kearney v. King*, 2 B. & Ald. 301.

² Byles 404; *Bradlaugh v. DeRin*, L. R. 3 C. P. 538; 5 *Ib.* 473; *Lebel v. Tucker*, L. R. 3 Q. B. 77.

³ *Woodruff v. Hill*, 116 Mass. 310 (1874).

⁴ *Lee v. Selleck*, 33 N. Y. 615 (1865).

⁵ *Freese v. Brownell*, 6 Vr. 285 (1871); *Wharton on Confl. Laws* § 513; *Story on Confl. Laws* § 307.

⁶ *Campbell v. Nichols*, 4 Vr. 81 (1868); *Freese v. Brownell*, 6 *Ib.* 285 (1871); *Jewell v. Wright*, 30 N. Y. 259 (1864); *Jacks v. Nichols*, 5 N. Y. 178 (1851); *Arnold v. Potter*, 22 Iowa 194 (1867); *Newman v. Kershaw*, 10 Wis. 333 (1860); *Dickinson v. Edwards*, 77 N. Y. 573 (1879); *Fitch v. Remer*, 8 Am. Law Reg. 654 (1860); *Healy v. Gorman*, 3 Green 328 (N. J. 1836); *Bank of Illinois v. Brady*, 3 McLean 268; *Agricultural National Bank v. Sheffield*, 4 Hun 421 (1875). In this case the note was dated and made payable at one place and executed in another. The same rule was held to govern in *Little v. Riley*, 43 N. H. 109, where the note was secured by a mortgage on lands situate where it was payable; and *Goodrich v. Williams*, 50 Ga. 425 (1873), where the lands mortgaged for security, as well as the residence of the maker, were in a place other than that named for its payment.

⁷ 2 Parsons 337. For cases on this subject, see *infra*.

the contract was made, though the contract would have been usurious if made there.¹ A bill of exchange may even be drawn on another State to take advantage of a higher local rate of interest, and be governed by the law of such State.²

But if a note is *void* for usury where made, it will be void everywhere, although it may have been made payable elsewhere as a cover for the usury.³ Thus, if a bill of exchange is drawn in Illinois by a citizen of that State and dated and negotiated there at a usurious rate, it will be governed as to the usury by the Illinois law, though accepted and payable in New York.⁴ But if a note is made, dated and payable in the same State, it has been held that it will be governed by the usury law of that State, though negotiated elsewhere.⁵ On the other hand, if made to be negotiated, and actually negotiated in another State, the law of that State will govern as to interest, and not the law where the bill was made, though accepted and payable there.⁶ If, however, a note is payable generally at a rate of interest which is usurious by the *lex fori*, it will not be presumed to be so by the law of the State where it was made.⁷

§ 31. **Lex Loci Solutionis Governs Grace—Currency—Alterations—Protest.**—The law of the place of payment also governs as to the days of grace to be allowed.⁸

The same law of place determines in what currency a bill or note is to be paid.⁹ And it has been held that the law of

¹ Edwards § 222; Story on Prom. Notes § 166; Lines v. Mack, 19 Ind. 223 (1862); Fitch v. Remer, 8 Am. Law Reg. 654 (1860).

² Smith v. Muncie Nat. Bank, 29 Ind. 158 (1867). So, too, interest reserved by mortgage, Hosford v. Nichols, 1 Paige 220 (1828).

³ Mix v. Madison Ins. Co., 11 Ind. 117 (1858).

⁴ Tilden v. Blair, 21 Wall. 241 (1874).

⁵ Clayes v. Hooker, 4 Hun 231; Jewell v. Wright, 30 N. Y. 259 (1864); Dickinson v. Edwards, 20 Alb. L. J. 310; 77 N. Y. 573 (1879); Hackettstown Bank v. Rea, 6 Lans. 455 (1872). But see, *contra*, First Nat. Bank v. Morris, 1 Hun 680 (1874).

⁶ Opdyke v. Merwin, 13 Hun 401 (1878).

⁷ Engler v. Ellis, 16 Ind. 475 (1861); Pugh v. Cameron, 11 W. Va. 523 (1877).

⁸ Byles 404; Blodgett v. Durgin, 32 Vt. 361 (1859).

⁹ Story on Prom. Notes § 163; Story on Confl. Laws §§ 270, 308; Wharton on Confl. of Laws § 437; Benness v. Clemens, 58 Penna. St. 24 (1868). In like manner as to weights and measures, Rosseter v. Cahlmann, 8 Exch. 361

the place of payment will determine whether the addition of certain words is a material alteration.¹

Where the law of the place of payment does not require notice of dishonor on refusal to accept a bill of exchange, it is not necessary to enable the holder of the bill to look to an English indorser, though between such indorser and his indorsee it would be.² On the other hand, a New York indorser will not be entitled to a discharge by reason of failure to demand payment and protest a bill of exchange for non-payment after protest for non-acceptance, such second demand and protest being required by the law of France, where the bill was payable, but not by that of New York.³ And the law of the place of payment governs also as to the notice of dishonor that is necessary. Thus the English courts have recognized the French law of protest as governing an English indorser.⁴ The same rule has been followed in the United States as to the sufficiency of protest.⁵

§ 32. **Drawer's Liability—Governed by what Law.**—The contract of the *drawer* is to pay generally, *i. e.* at the place where the bill is drawn, if no other place of payment is expressed.⁶ His contract with the payee is governed by that law.⁷ The law of that place determines the damages and interest for which he becomes liable,⁸ and the legality of his contract in reference to usury laws.⁹

¹Holland v. Hatch, 15 Ohio St. 464 (1864).

²Byles 405; Horne v. Rouquette, L. R. 3 Q. B. 514 (1878).

³2 Parsons 336; Story on Bills § 176; Aymar v. Sheldon, 12 Wend. 439 (1834).

⁴Byles 405; 2 Parsons 336; Story on Prom. Notes § 177; as to time for sending notice, Rothschild v. Currie, 1 Q. B. 43; and as to mode of sending it, Hirschfeld v. Smith, L. R. 1 C. P. 340.

⁵Chatham Bank v. Allison, 15 Iowa 357 (1863).

⁶1 Daniel 853; Freese v. Brownell, 6 Vr. 285 (1871); Everett v. Vendryes, 19 N. Y. 436 (1859); Hunt v. Standart, 15 Ind. 33 (1860); Raymond v. Holmes, 11 Tex. 54 (1853); Kuenzi v. Elvers, 14 La. An. 392 (1859); Lennig v. Ralston, 23 Penna. St. 137, 140 (1854); Price v. Page, 24 Mo. 65 (1856); Bouldin v. Page, *Ib.* 594 (1857); Page v. Page, *Ib.* 595 (1857); Smith v. Mead, 3 Conn. 253 (1820); Blodgett v. Durgin, 32 Vt. 361 (1859).

⁷Byles 274; 1 Daniel 853; Story on Bills § 131. So, too, if drawer and drawee reside in different places, Gibbs v. Fremont, 9 Exch. 25.

⁸Crawford v. Branch Bank, 6 Ala. 13 (1844).

⁹Merchants' Nat. Bank v. Griswold, 72 N. Y. 472 (1878).

§ 33. **Place of Payment—What.**—The presumption is that a note dated at a certain place is made and payable there, if no other place of payment is expressed.¹ And the place of the date has been held to be *prima facie* the place of payment where it is the maker's residence or place of business, though the note was actually made elsewhere.² But a mortgage made in one country on lands lying in another has been held to be payable *prima facie* where the lands lie and to be governed by the law of that place.³ If no place of payment is named, parol evidence is not admissible to show that some special place of payment was agreed on.⁴

Where a bill of exchange is specially addressed to the drawee, such address is presumed to be the place intended for its payment.⁵ So, a general acceptance is presumably payable where it is made;⁶ and, in Scotland, at the place where the acceptor resides at the maturity of the bill.⁷ On the other hand, the acceptor's liability for interest and damages has been held to be at the rate fixed by the law of the place where the bill was drawn.⁸

An indorsement has been held to be *prima facie* payable

¹ Daniel 841; 2 Parsons 320; Wilson v. Lazier, 11 Gratt. 477 (1854); Blodgett v. Durgin, 32 Vt. 361 (1859); Thompson v. Ketcham, 4 Johns. 285 (1809); Short v. Trabue, 4 Metc. 299 (Ky. 1863); Backhouse v. Selden, 29 Gratt. 581 (1877).

² Tillotson v. Tillotson, 34 Conn. 335 (1867). Especially if such intendment be necessary to make the instrument valid under the laws against usury, Bullard v. Thompson, 35 Tex. 313 (1872).

³ Stapleton v. Conway, 3 Atk. 727; Chapman v. Robertson, 6 Paige 627 (1827).

⁴ 2 Parsons 334; Frazier v. Warfield, 9 Sm. & M. 220 (1848). But see, *contra*, Blodgett v. Durgin, 32 Vt. 361 (1859).

⁵ 1 Daniel 841; Worcester Bank v. Wells, 8 Metc. 107 (1844); Lizardi v. Cohen, 3 Gill 430 (1845); Freese v. Brownell, 6 Vr. 285 (1871).

⁶ Musson v. Lake, 4 How. 262 (1846); Todd v. Bank of Kentucky, 3 Bush 626 (1868). In this case it was held that the acceptor had an implied authority to designate a place of payment and would then be governed by the laws of that place.

⁷ Don v. Lippman, 5 Cl. & Fin. 1, 12 (1837). So, in Tennessee, an acceptance has been held payable at the acceptor's place of residence, Frierson v. Galbrath, 12 B. J. Lea 129 (1883).

⁸ Bailey v. Heald, 17 Tex. 102 (1856); Raymond v. Holmes, 11 Ib. 54 (1853); *contra*, Abel v. McMurray, 10 Tex. 350 (1853). And in Frierson v. Galbrath, 12 B. J. Lea 129 (1883), the acceptor's liability for interest was determined by the law of his residence, the bill being considered payable there.

at the residence of the holder, and governed by the law of that place.¹ An intention, however, to make it payable at the residence of the makers and indorsers, rather than that of the holder, may be inferred from circumstances and subject the indorsement to the law of the indorser's own residence.²

§ 34. **Presumptions as to Foreign Law.**—It is to be remembered that courts of one State take no judicial notice of the laws of another.³ And they are not concluded by the decisions of the courts of another State as to the application of the common law or of the *lex mercatoria* in such other State.⁴ When the laws of another State are relied upon they must be proved affirmatively,⁵ and if not so proved they will be presumed to be the same as the *lex fori*.⁶

¹ Lee v. Selleck, 33 N. Y. 615 (1865).

² Van Zant v. Arnold, 31 Ga. 210 (1860); Bullard v. Thompson, 35 Tex. 313, 318 (1872).

³ Byles 408; 1 Daniel 847; Story on Confl. Laws § 637; Legg v. Legg, 8 Mass. 99, 101 (1811); Bean v. Briggs, 4 Iowa 464, 468; Hunt v. Johnson, 44 N. Y. 27 (1870); Mostyn v. Fabrigas, Cowp. 174; Male v. Roberts, 3 Esp. 163.

⁴ First Nat. Bank of Michigan v. Green, 33 Iowa 140 (1871).

⁵ Byles 408; Story on Confl. Laws § 638; 1 Daniel 847; 2 Parsons 334; 1 Edwards § 9; Benham v. Lord Mornington, 3 C. B. 133; Hunt v. Johnson, 44 N. Y. 27, 40 (1870); Dunn v. Adams, 1 Ala. 527 (1840); Whidden v. Seelye, 40 Me. 247, 253 (1855); Bean v. Briggs, 4 Iowa 464, 467 (1857); Harper v. Hampton, 1 Harr. & J. 622, 687 (1805); Martin v. Martin, 1 Smed. & M. 176 (1843); Uhler v. Semple, 5 C. E. Gr. 288, 294 (1869); Allen v. Watson, 2 Hill (S. C.) 319; Crozier v. Hodge, 3 La. 357; Kline v. Baker, 99 Mass. 253; Knapp v. Abell, 10 Allen 485; Bowditch v. Soltyk, 99 Mass. 136; Campion v. Kille, 1 McCart. 229; Ball v. Franklinite Co., 3 Vr. 102; Delaware v. Hand, 3 Johns. 310; Francis v. Insurance Co., 6 Cowen 404, 429; Lincoln v. Battelle, 6 Wend. 475; Dollfus v. Frosch, 1 Denio 367; Talbot v. Seeman, 1 Cranch 1, 38; Haven v. Foster, 9 Pick. 111, 129; Palfrey v. Portland, &c., R. R. Co., 4 Allen 55; Brackett v. Norton, 4 Conn. 517; Mostyn v. Fabrigas, Cowp. 174; Freemoult v. Dedire, 1 P. Wms. 429; Male v. Roberts, 3 Esp. 163; Smith v. Blagge, 1 Johns. 238; Territt v. Woodruff, 19 Vt. 182; Taylor v. Bank of Illinois, 7 T. B. Mon. 576; Barrows v. Downs, 9 R. I. 446; Bryant v. Kelton, 1 Tex. 434; McDeed v. McDeed, 67 Ill. 545; Rape v. Heaton, 9 Wis. 328; Walsh v. Dart, 12 Wis. 635; Nelson v. Bridport, 8 Beav. 527; Baltimore and Ohio R. R. Co. v. Glenn, 28 Md. 287; Gardner v. Lewis, 7 Gill 377; DeSobry v. DeLaistre, 2 Harr. & J. 191; Norris v. Harris, 15 Cal. 226; 1 Chitty Plead. 219; 1 Phill. Ev. 301, 302 n.; Daniell Ch. Pr. (4 Am. Ed.) 95, 864; 1 Greenleaf Ev. §§ 486, 488; Best Ev. §§ 33, 513; Carnegie v. Morrison, 2 Mete. 381, 404 (1841); Mason v. Dousay, 35 Ill. 424, 433 (1864); McDougald v. Rutherford, 30 Ala. 253 (1857). So, a local custom as to days of grace, Goddin v. Shipley, 7 B. Mon. 575 (1847).

⁶ Byles 408; 1 Daniel 847; 2 Parsons 334; 1 Edwards § 9; Brown v. Gracey, D. & R. N. P. C. 41 n.; Hunt v. Johnson, 44 N. Y. 27, 40 (1870); Dunn v. Adams, 1 Ala. 527, 529 (1840); Fouke v. Fleming, 13 Md. 392 (1858); Whidden v. Seelye, 40 Me. 247, 254 (1855); Legg v. Legg, 8 Mass. 99, 101 (1811); Bean v. Briggs, 4 Iowa 464, 468 (1857); Harper v. Hampton, 1 Harr. & J.

Thus, a third party indorsing a note before its delivery, is by Massachusetts law an indorser, and this will be presumed to be the Rhode Island law as to an indorsement made there, in an action on it in the courts of Massachusetts.¹ So, the foreign rate of interest, if not proved, is presumed to be the same as that of the *forum*.² But this presumption will not be made to render a note void for usury;³ or because it was made on Sunday;⁴ or because of the maker's infancy.⁵ In like manner, the foreign law as to rate of damages is *prima facie* the same as the *lex fori*.⁶ So, as to days of grace.⁷ So the *lex loci contractus* will be presumed to allow an indorsee to sue the indorsers before exhausting his remedy against the maker, if this is the *lex fori*.⁸

A country which has separated from another will generally be presumed, however, to have continued its former laws in

622, 687 (1805); *Kuenzi v. Elvers*, 14 La. An. 392 (1859); *Hill v. Wilker*, 41 Ga. 449 (1871); *Flato v. Mulhall*, 72 Mo. 522 (1880); *Cooper v. Reaney*, 4 Minn. 528 (1860); *Brimhall v. Van Campen*, 8 Minn. 13 (1862); *Donegan v. Wood*, 49 Ala. 242 (1873); *Farhni v. Ramsee*, 19 Ind. 400 (1862); *Holmes v. Broughton*, 10 Wend. 75; *Leavenworth v. Brockeway*, 2 Hill 201; *McDougald v. Rutherford*, 30 Ala. 253 (1857); *Allen v. Watson*, 2 Hill (S. C.) 319; *Crozier v. Hodge*, 3 La. 357; *Chapin v. Dobson*, 78 N. Y. 74 (1879).

¹*Dubois v. Mason*, 127 Mass. 37 (1879).

²*Cooper v. Reaney*, 4 Minn. 528 (1860); *Hawley v. Sloo*, 12 La. An. 815; *Martin v. Hazard Powder Co.*, 2 Col. 596 (1875). And if the contract is governed by the law of another State and rendered usurious by such law, that must be proved, *Pomeroy v. Ainsworth*, 22 Barb. 118 (1856); *Cutler v. Wright*, 22 N. Y. 472 (1860). So of a foreign bond, *Thompson v. Bowles*, 2 Sim. 194.

³*Engler v. Ellis*, 16 Ind. 475 (1861); *Pugh v. Cameron*, 11 W. Va. 523 (1877); *White v. Friedlander*, 35 Ark. 52 (1879); *Forsyth v. Baxter*, 3 Ill. 9 (1839); *Greenwade v. Greenwade*, 3 Dana 497 (1835). So, too, where the controlling law is that of the place of payment, the contract will not be presumed usurious, because it would be so by the *lex fori*, *Martin v. Martin*, 1 Sm. & M. 176 (1843).

⁴*O'Rourke v. O'Rourke*, 43 Mich. 58 (1880). But see, *contra*, *Hill v. Wilker*, 41 Ga. 449 (1871); *Brimhall v. Van Campen*, 8 Minn. 13 (1862); *Sayre v. Wheeler*, 31 Iowa 112 (1870).

⁵*Thompson v. Ketcham*, 8 Johns. 146 (1811). But see, *Seyfert v. Edison*, 16 Vr. 393 (1883), where a transfer from husband to wife made in Pennsylvania was presumed in New Jersey to be illegal as at common law.

⁶*Kuenzi v. Elvers*, 14 La. An. 391 (1859).

⁷*Wood v. Corl*, 4 Mete. 203 (1842); *Dollfus v. Frosch*, 1 Denio 367 (1845). But in *Lucas v. Ladew*, 28 Mo. 342 (1859), the common law as to grace, abolished by statute in Missouri, was presumed in Missouri to remain unchanged in New York.

⁸*Bean v. Briggs*, 4 Iowa 467 (1857); *Bernard v. Barry*, 1 Gr. 388, 391 (Iowa 1848).

force, as in the case of the States formerly governed by the English common law.¹ But the common law will not be presumed to govern in Texas, as that State was never subject to Great Britain.²

The *lex mercatoria*, being of general, if not universal application, has been held to be *prima facie* the foreign law, as to the allowance of days of grace.³ So, as to the negotiability of bonds or coupons drawn in negotiable form.⁴

¹ *Dickinson v. Hoopes*, 8 Gratt. 353, 408 (1852); *Arayo v. Currell*, 1 La. 528 (1830). Thus, a wife will be presumed in New Jersey incapable by Pennsylvania law, as by the common law, of binding herself as maker of an accommodation note for her husband, *Seyfert v. Edison*, 16 Vr. 393 (1883). So, as to common law of grace, *Lucas v. Ladew*, 28 Mo. 341 (1859); of negotiability, *Dunn v. Adams*, 1 Ala. 527; of admissibility of *want of consideration* as a defense, *Crouch v. Hall*, 15 Ill. 263 (1856).

² *Flato v. Mulhall*, 72 Mo. 522 (1880). Nor can the common law be presumed to have force in Russia, *Savage v. O'Neil*, 44 N. Y. 298 (1871).

³ *Reed v. Wilson*, 12 Vr. 29 (1879); *Lucas v. Ladew*, 28 Mo. 342 (1859).

⁴ *Tyrell v. Cairo and St. Louis R. R. Co.*, 7 Mo. App. 294 (1879).

II. SPECIAL APPLICATIONS.

- 35. Capacity—What law governs.
- 36. Form—What law governs.
- 37. Nature and Interpretation—What law governs.
- 38. Liability of Drawer—Surety—Indorser.
- 39. Liability—Governed by Place of Payment.
- 40. Validity—What law governs.
- 41. Interest—Implied rate.
- 42. Damages—Exchange—Currency.
- 43. Usury—Election between different rates.
- 44. Place of Contract.
- 45. *Situs* of Landed Security.
- 46. Place of Payment.
- 47. Negotiability—What law governs.
- 48. Transfer—Form governed by what law.
- 49. Transfer by Executor—Suit by Assignee.
- 50. *Bona fide* Holder—Admissibility of Defense.
- 51. Grace—What law governs.
- 52. Demand—Protest—What law governs.
- 53. Remedy—Governed by *lex fort.*
- 54. Limitation of Actions—What law governs.
- 55. Parties—Evidence—What law governs.
- 56. Damages—Interest—Exchange—Set-Off.
- 57. Discharge—Payment—What law governs.
- 58. Insolvent's Discharge—What law governs.
- 59. Foreign Statutes as to Conflict of Laws.

§ 35. Capacity—What Law Governs.—The capacity of the parties to a contract is in general to be determined by the *lex loci contractus*.¹ Thus, an infant's contract will be sustained, if valid by the *lex loci contractus*.² So, the contract of a married woman.³ But in Mississippi the note of a married woman for supplies to her plantation has been held enforceable by Mississippi law, although made in another State where it could not have been enforced.⁴ And, on the

¹2 Parsons 349; Story on Confl. Laws § 163. So held as to capacity to make a deed, Huey's Appeal, 1 Grant Cas. 51 (1854). But it seems that under the law of France a married woman's capacity to contract is decided according to the law of her domicile, *Garnier v. Poydras*, 13 La. 177 (1838).

²So, as to an infant's contract for necessities, *Male v. Roberts*, 3 Esp. 163. But see Story on Confl. Laws §§ 66, 73. And the law of the place of forum controls the matter of minority, when it comes in question, only on the point of the minor's authority to maintain his action, *Barrera v. Alpuente*, 18 Martin 69 (1827).

³*Bell v. Packard*, 69 Me. 105 (1879). But see *Hayden v. Stone*, 13 R. I. 106 (1880), in which case the Rhode Island courts refused to enforce against a married woman resident in Massachusetts a note made by her there, she being incapable of such contract by the laws of Rhode Island.

⁴*Shacklett v. Polk*, 51 Miss. 378 (1875).

other hand, the Mississippi courts have refused to enforce the note of a married woman resident in Mississippi, though dated in Louisiana and valid there by statute.¹

A transfer made by an executor or administrator will be sufficient, if it is valid by the law of the place of transfer.² And although it is a well-settled rule, already referred to, that a State will not enforce foreign laws that contravene its own policy, yet a note made to a foreign corporation may be enforced notwithstanding that the law of the forum as to license of such corporation's business has not been complied with.³

§ 36. **Form—What Law Governs.**—A contract is also governed as to all questions of formality of execution by the law of the place where it is made.⁴ If defective in form and therefore invalid there, it is so everywhere.⁵ Thus, a verbal acceptance is valid or otherwise according to the law of the place of acceptance, not of the place of drawing the bill.⁶ But a promise to accept may be enforceable as a valid contract, though not equivalent where it was given to an acceptance.⁷

In like manner, an indorsement in blank made in France

¹Bank of Louisiana v. Williams, 46 Miss. 618 (1872).

²1 Daniel 843; 2 Parsons 373 n.; Story on Confl. Laws § 350; Wharton on Confl. Laws § 457; Harper v. Butler, 2 Pet. 239 (1829); Andrews v. Carr, 26 Miss. 577 (1853); Owen v. Moody, 29 Ib. 79 (1855). But see, *contra*, Thompson v. Wilson, 2 N. H. 291 (1820); Stearns v. Burnham, 5 Me. 261 (1828).

³Shook v. The Singer Manufacturing Co., 61 Ind. 520 (1878).

⁴Story on Bills § 131; 1 Daniel 830; 2 Parsons 317; Story on Prom. Notes § 158; Wood v. Gibbs, 35 Miss. 559 (1858); Dacosta v. Davis, 4 Zab. 319 (1854); Hyde v. Goodnow, 3 N. Y. 266 (1850); Evans v. Anderson, 78 Ill. 558 (1875). So, in Great Britain, Bills of Exch. Act, 1882, § 72. But if in form it accords with the requirements of English law, it is valid as between all parties to it in Great Britain, *Ib.*

⁵Thayer v. Elliott, 16 N. H. 102 (1844); Van Schaick v. Edwards, 2 Johns. Cas. 355 (1801); Kanaga v. Taylor, 7 Ohio St. 134 (1857); Ford v. Buckeye Ins. Co., 6 Bush 133 (1869); Palmer v. Farrington, 1 Ohio St. 253 (1853); Jewell v. Wright, 30 N. Y. 259 (1864).

⁶Mason v. Dousay, 35 Ill. 424 (1864); Bissell v. Lewis, 4 Mich. 450 (1857); Bank of Rutland v. Woodruff, 34 Vt. 89 (1861). But the mere fact of the drawee's being resident in another place will not affect an acceptance given by a member of the drawee's firm in the place where the bill was drawn, Scudder v. Union Nat. Bank, 1 Otto 406 (1875).

⁷Russell v. Wiggin, 2 Story 213. 231 (1842); Carnegie v. Morrison, 2 Metc. 381 (1841); Bissell v. Lewis, 4 Mich. 450, 460 (1857); Barney v. Newcomb, 9 Cush. 46 (1851).

is void there and therefore will not be enforced in an English court though valid in England.¹ But a Bank of England note transferred by delivery in France, where such transfer is insufficient, has been held in England (the place both of the original contract and of the forum) to have been lawfully transferred.² On the other hand, where a note has been transferred according to the law of the place of transfer by delivery, but such transfer is bad for want of indorsement by the law both of the place of the original contract and of the forum, it will not be enforced at suit of the holder in the courts of the latter place.³ So, if it is illegal where made for want of a statutory certificate.⁴

If a bill or note is void for want of a stamp by the *lex loci contractus*, it will be void everywhere.⁵ But if the Stamp Act relates simply to admissibility in evidence, its effect will be confined to the courts of its own State.⁶

§ 37. **Nature—Interpretation—What Law Governs.**—The nature, interpretation and obligation of contracts are all to be determined by the law of the place of contract.⁷ And as

¹Trimbey v. Vignier, 1 Bing. N. C. 151; S. C., 4 Moo. & S. 695; S. C., 6 C. & P. 25.

²Dela Chaumette v. Bank of England, 2 B. & Ad. 385; S. C., 9 B. & C. 208.

³Roosa v. Crist, 17 Ill. 450 (1855).

⁴Moore v. Clopton, 22 Ark. 125 (1860).

⁵Alves v. Hodgson, 7 T. R. 241; Bristow v. Sequeville, 5 Exch. 279; Clegg v. Levy, 3 Campb. 166. A contrary doctrine was formerly held in James v. Catherwood, 3 D. & R. 190; Wynne v. Jackson, 2 Russ. 351. And an exception is made to the rule where the bill or note is payable in the place where suit is brought, Ludlow v. Van Rensselaer, 1 Johns. 94 (1806). But the contrary is now provided in Great Britain as to bills issued abroad, Bills of Exch. Act, 1882, § 72.

⁶Fant v. Miller, 17 Gratt. 47 (1866); Lambert v. Jones, 2 Patt. & H. 144 (1856).

⁷2 Parsons 319; Story on Prom. Notes §§ 159-161; 1 Edwards § 218; 1 Daniel 330; Hyde v. Goodnow, 3 N. Y. 266 (1850); Evans v. Anderson, 78 Ill. 558 (1875); Bulger v. Roche, 11 Pick. 36, 38 (1831); Goodman v. Munks, 8 Port. 84 (1838); Mineral Point R. R. Co. v. Banon, 83 Ill. 365 (1876); Carnegie v. Morrison, 2 Mete. 381, 397 (1841); Bissell v. Lewis, 4 Mich. 450, 459 (1857); Fitch v. Remer, 8 Am. Law Reg. 654 (1860). So, as to interpretation alone, Bell v. Packard, 69 Me. 105 (1879); Pease v. Pease, 35 Conn. 131 (1868); Arnold v. Potter, 22 Iowa 194 (1867); Armour v. McMichael, 7 Vr. 92 (1872); Varick v. Crane, 3 Gr. Ch. 128 (1837); Benners v. Clemens, 58 Penna. St. 24 (1868); Chapman v. Robertson, 6 Paige 627 (1837); Chartres v. Cairnes, 4 Mart. (N. S.) 1 (1825); Warder v. Arell, 2 Wash. 282 (Va. 1826); Smith v. Smith, 2 Johns. 235 (1807). So, as to nature and interpretation,

to the construction of the laws of foreign States it has been held that the decisions of their own courts are binding upon the courts of other States.¹

§ 38. **Liability of Drawer—Surety—Indorser.**—The liability of the drawer of a bill is governed by the *lex loci contractus* except in cases where the *lex loci solutionis* is intended to control.² Thus the drawer's liability to an indorsee on non-acceptance is determined by the place of contract and not by the place of indorsement.³ So, the indorser's right to set up equitable defenses is determined by the law of the place of his contract and will not be affected by the law of any place where the note may be subsequently transferred.⁴ So, failure of consideration may be set up by the drawer of a bill even against a *bona fide* holder for value under the law of the place where the bill was drawn, though it would not have been admissible by the laws of the drawer's residence.⁵

So, a principal's liability to his surety on a note is governed by the law of the place of contract, and not affected by a subsequent change of domicil.⁶

The indorser's liability is governed, as we have seen, by

Pearsall v. Dwight, 2 Mass. 84 (1806). So, as to interpretation and obligation, *Steele v. Curle*, 4 Dana 381 (1836); *Porter v. Munger*, 22 Vt. 191 (1850). So, as to obligation alone, *Kanaga v. Taylor*, 7 Ohio St. 134, 147 (1857); *Armendiaz v. Lema*, 40 Tex. 291 (1874); *Jewell v. Wright*, 30 N. Y. 259 (1864); *Churchill v. Cole*, 32 Vt. 93 (1859); *Atwater v. Walker*, 1 C. E. Gr. 42; *S. C.*, 2 McCart. 502 (1863); *Thorp v. Craig*, 10 Iowa 461 (1860); *Harrison v. Edwards*, 12 Vt. 648, 652 (1840). So, as to nature and obligation, *Trasher v. Everhart*, 3 Gill & J. 234 (1831); *Wood v. Gibbs*, 35 Miss. 559 (1858); *Story on Bills* § 131. So, as to nature only, *Stevens v. Norris*, 30 N. H. 466 (1855). The English Bills of Exchange Act of 1882 makes the interpretation to be determined by the law of the place of contract, except as to foreign indorsements of inland bills, which are to be interpreted "as regards the payer" by English law, § 72.

¹ *Hunt v. Hunt*, 72 N. Y. 217 (1878).

² 2 Parsons 335; 1 Edwards § 228; *Story on Bills* § 131; *Story on Prom. Notes* § 172; *Thorp v. Craig*, 10 Iowa 461 (1860); *Wood v. Gibbs*, 35 Miss. 559 (1858).

³ *Everett v. Vendryes*, 19 N. Y. 436 (1859).

⁴ 2 Parsons 338; 1 Edwards § 228; 1 Daniel 851; *Wilson v. Lazier*, 11 Gratt. 477, 482 (1854); *Yeatman v. Cullen*, 5 Blackf. 241 (1839); *Stacy v. Baker*, 2 Ill. 417 (1837); *Brabston v. Gibson*, 9 How. 263 (1850).

⁵ *Wood v. Gibbs*, 35 Miss. 559 (1858).

⁶ *Long v. Templeman*, 24 La. An. 564 (1872).

the place where the indorsement is made.¹ Want of diligence in prosecuting the maker will discharge the indorser, if it does so by the law of his place of indorsement.² And the place of contract for the maker of the note often differs from that for the indorser.³ Moreover, the *lex loci contractus* is to determine whether the holder of a bill is entitled to protection as a *bona fide* holder against equitable defenses.⁴ But an accommodation indorsement written in one State and delivered in another is governed by the law of the latter;⁵ especially if written with the intention of delivery in such other State.⁶

§ 39. **Liability—Governed by Place of Payment.**—The rights and liabilities of the parties are to be controlled, however, as we have seen, by the place of performance, when such appears to have been their intention.⁷ And the law of the place where a bill is indorsed and made payable will control that of the place where it is drawn, though the latter be also the place where the action is brought.⁸ In like man-

¹Story on Prom. Notes § 171; Story on Bills § 147; 1 Daniel 855; 1 Edwards § 230; Cook v. Litchfield, 9 N. Y. 279 (1853); S. C., 5 Sandf. 330 (1851); Davis v. Clemson, 6 McLean 622, 624 (1855); Williams v. Wade, 1 Metc. 82 (1840); Dow v. Rowell, 12 N. H. 49 (1841); Dundas v. Bowler, 3 McLean 397, 400 (1844); Aymar v. Sheldon, 12 Wend. 439, 443 (1834); Slacum v. Pomery, 6 Cranch 221 (1810); First National Bank of Michigan v. Green, 33 Iowa 140 (1871); Short v. Trabue, 4 Metc. 299 (Ky. 1863); Trabue v. Short, 18 La. An. 257 (1866); Trabue v. Short, 5 Coldw. 293 (1865); Yeatman v. Cullen, 5 Blackf. 240 (1839); Greathead v. Walton, 40 Conn. 226 (1873); Clanton v. Barnes, 50 Ala. 260 (1873); Dunn v. Adams, 1 Ala. 527 (1840); Lennig v. Ralston, 23 Penna. St. 137, 140 (1854). And the *lex fori* cannot make an indorser liable as such, if by the *lex loci contractus* the note is non-negotiable and the assignor not liable as indorser, Stix v. Matthews, 75 Mo. 96 (1881).

²Williams v. Wade, 1 Metc. 82 (1840); Lee v. Selleck, 33 N. Y. 615, affirming 32 Barb. 522.

³Hatcher v. McMorine, 4 Dev. 122 (1833); Greathead v. Walton, 40 Conn. 226 (1873); Lee v. Selleck, 33 N. Y. 615 (1865); Lowry v. Western Bank, 7 Ala. 120 (1844).

⁴Allen v. Bratton, 47 Miss. 119, 129 (1872).

⁵Young v. Harris, 14 B. Mon. 556 (1854).

⁶Lee v. Selleck, 33 N. Y. 615 (1865). But see Lowry v. Western Bank, 7 Ala. 120 (1844), where the place of execution was held to govern the indorsement, although the note was payable in Georgia and made and indorsed in Alabama with the intention to negotiate it in Georgia.

⁷Hibernia Nat. Bank v. Lacombe, 84 N. Y. 367 (1881); Musson v. Lake, 4 How. 262 (1846).

⁸Brabston v. Gibson, 9 How. 263 (1850). But the drawer's right to notice

ner, the drawer's liability for damages is determined by the place of his contract, that being his intended place of payment.¹ So, his liability for interest,² as well as the question whether a foreign indorsement is sufficient in form to enable the foreign indorsee to maintain an action against him.³ So, his right to a demand at maturity and to protest and notice of dishonor.⁴

The contract of the indorser is not in general for payment at the place of payment designated in the bill or note, but for payment at his residence or at the place of his contract, if the maker or acceptor fails to pay at the place of payment. The liability of the indorser is therefore in some respects determined by the law of the place of indorsement in disregard of the place of payment named in the instrument. This has been held to be so as to the rate of damages for which he is liable;⁵ and the diligence to which he is entitled on the holder's part in prosecution of the maker;⁶ as well as his right to protest and notice of dishonor.⁷ A more reasonable rule has, however, been laid down in England to the effect that the necessity for notice of protest in behalf of a remote indorsee is to be determined by the *lex loci solutionis* and not

of protest has been held to depend on the law of the place of his contract, and not of the place of payment named in the bill, *Raymond v. Holmes*, 11 Tex. 54 (1853).

¹ *Hendricks v. Franklin*, 4 Johns. 119 (1809).

² *Gibbs v. Fremont*, 9 Exch. 25 (1853).

³ *Everett v. Vendryes*, 19 N. Y. 436 (1859). But it seems that between the immediate parties to such indorsement the law where it was made would determine its validity, *Id.*

⁴ Story on Bills § 176.

⁵ 2 Kent Com. 460; Story on Conf. Laws § 314; *Slacum v. Pomery*, 6 Cranch 221 (1810); *Graves v. Dash*, 12 Johns. 17 (1814). But see, *contra*, *Peck v. Mayo*, 14 Vt. 33 (1842), as to rate of interest.

⁶ Story on Conf. Laws § 316b; *Lee v. Selleck*, 33 N. Y. 615 (1865), affirming 32 Barb. 522; *Short v. Trabue*, 4 Mete. 299 (Ky. 1863); *Trabue v. Short*, 5 Coldw. 293 (1868); *Trabue v. Short*, 18 La. An. 257 (1866); *Hunt v. Standart*, 15 Ind. 38 (1860), overruling *Shanklin v. Cooper*, 8 Blackf. 41 (1846); *Bank of Illinois v. Brady*, 3 McLean 268. And not the place of making the note, *Williams v. Wade*, 1 Mete. 82; or of the forum, *Burrows v. Hannegan*, 1 McLean 315 (1838). See, too, *Holbrook v. Vibbard*, 3 Ill. 465 (1840); *Conahan v. Smith*, 2 Disney 9 (1858).

⁷ 2 Parsons 343; Story on Bills § 285; Story on Prom. Notes § 177; 1 Edwards § 333; *Aymar v. Sheldon*, 12 Wend. 439 (1835); *Artisans' Bank v. Park Bank*, 41 Barb. 579 (1864); *Lowry v. Western Bank*, 7 Ala. 120 (1844).

by the law of the place of indorsement;¹ and that the time for giving such notice may be extended by the law of the foreign place of payment so as to be binding on the English indorser.²

§ 40. **Validity—What Law Governs.**—The validity of the contract is determined by the *lex loci contractus*;³ and the consideration necessary to its validity.⁴ If the consideration is valid where the instrument is executed, it is valid everywhere.⁵ If illegal in whole or in part there, it is illegal everywhere;⁶ especially where it is made and payable in the same place.⁷ And even where the consideration was the sale of lottery tickets in a place where it was against the law, a note given for that consideration in a State where the sale would have been valid, has been held to be itself valid.⁸

On the other hand, if the place of sale whose law has been violated is that of the forum, its courts will not enforce such note; as in the case of a note given in Massachusetts for liquor sold in violation of law in New Hampshire and sued on in New Hampshire.⁹ But the Massachusetts courts have sustained as valid by New York law an executory contract for liquor made in Massachusetts, the liquor having been actually sold and delivered in New York.¹⁰ Where a note is

¹ *Horne v. Rouquette*, L. R. 3 Q. B. D. 514 (1878).

² *Rouquette v. Overman*, L. R. 10 Q. B. 525 (1875).

³ *Woodruff v. Hill*, 116 Mass. 310 (1874); *Dolman v. Cook*, 1 McCart. 56 (1861); *Atwater v. Walker*, 1 C. E. Gr. 42; S. C., 2 McCart. 502 (1863); *Armour v. McMichael*, 7 Vr. 92 (1872); *Ory v. Winter*, 4 Mart. (N. S.) 277 (1826); *Green v. Sarmiento*, 3 Wash. C. C. 17 (1811); *Western R. R. Co. v. Taylor*, 6 Heisk. 408 (1871). So, the question of legality under a statutory prohibition of banking powers, *Davidson v. Lanier*, 4 Wall. 447 (1836).

⁴ *Hyde v. Goodnow*, 3 N. Y. 266 (1850); *Evans v. Anderson*, 78 Ill. 558 (1875).

⁵ *Fant v. Miller*, 17 Gratt. 47 (1866); *Andrews v. Herriot*, 4 Cow. 510 n. (1825); *Pearsall v. Dwight*, 2 Mass. 84, 88 (1806); *Kanaga v. Taylor*, 7 Ohio St. 134 (1857); *Frazier v. Fredericks*, 4 Zab. 162 (1853); *Pugh v. Cameron's Adm'r*, 11 W. Va. 523 (1877); *Carnegie v. Morrison*, 2 Metc. 381, 401 (1841).

⁶ *Pecker v. Kennison*, 46 N. H. 488 (1866).

⁷ *Ivey v. Lalland*, 42 Miss. 444 (1869); *Collins Iron Co. v. Burkam*, 10 Mich. 283 (1862).

⁸ *Jameson v. Gregory*, 4 Metc. 363 (Ky. 1863).

⁹ *Fuller v. Bean*, 30 N. H. 181 (1855).

¹⁰ *Abberger v. Marrin*, 102 Mass. 70 (1869). In this case the purchaser sought by his action in Massachusetts to recover the money paid by him for the goods purchased.

given for a sale of intoxicating liquor, the law of New Hampshire now throws the burden on the holder of proving a license for the sale, but this law will not be applied to a sale made in another State.¹ Nor will it constitute a defense against a *bona fide* holder that the note was given in another State for liquor illegally sold there.²

§ 41. **Interest—Implied Rate.**—The interest payable on a contract, if not designated, is to be computed by the *lex loci contractus*.³ So, an authority by letter written in New York to draw a bill in Louisiana on New York has been held to imply an agreement for interest at the rate which is legal in Louisiana.⁴ The indorser is liable in like manner for interest at the rate which is legal at the place of indorsement,⁵ and the acceptor for that of the place of acceptance, not that of the place where the bill was drawn.⁶

But if the place of payment is expressed and the rate of interest is not designated, it is to be computed at the rate which obtains where it is payable.⁷ And this is true although

¹Doolittle v. Lyman, 44 N. H. 608 (1863).

²Great Falls Bank v. Fannington, 41 N. H. 32 (1860).

³Story on Prom. Notes § 166; Byles 406; 2 Edwards § 1009; Story on Bills § 148; Gibbs v. Fremont, 9 Exch. 31; Jewell v. Wright, 30 N. Y. 259 (1864); Merchants' Bank v. Griswold, 72 Ib. 472 (1878); Sheldon v. Haxton, 24 Hun 196 (1881); Stickney v. Jordan, 58 Me. 106 (1870); Varick v. Crane, 3 Gr. Ch. 128 (1837); Bowles v. Eddy, 33 Ark. 645 (1878); Second Nat. Bank v. Smoot, 2 MacArth. 371 (1876); Hawley v. Sloo, 12 La. An. 815 (1857). So, too, in other contracts, Consequa v. Willings, 1 Pet. C. C. 225 (1816). So, a bond given in England for a debt contracted in Ireland draws interest at the English rate, Rainelaugh v. Champante, 2 Vern. 394. And if such rate be express, though higher than that allowed where the debt was contracted, the bond will be valid, Connor v. Bellamont, 2 Atk. 381. But see, *contra*, Sands v. Smith, 1 Neb. 108, where a note given in Nebraska and secured by a Nebraska mortgage, but made for a New York loan and payable in New York, was held to be governed by New York law and to be void for usury.

⁴Lanusse v. Barker, 3 Wheat. 101 (1818).

⁵Mullen v. Morris, 2 Penna. St. 85, 87 (1845), the note being in this case payable at the same place.

⁶Byles 406; Cooper v. Earl of Waldegrave, 2 Beav. 282; Allen v. Kemble, 6 Moo. P. C. 314; Abel v. McMurray, 10 Tex. 350 (1853). Frierson v. Galbrath, 12 B. J. Lea 129 (1883), the place of the acceptor's residence being held in this case to be the place of payment. But see, *contra*, Raymond v. Holmes, 11 Tex. 54 (1853); Bailey v. Heald, 17 Ib. 102 (1856).

⁷Story on Prom. Notes § 166; Story on Conf. of Laws § 292; 2 Edwards § 1009; 2 Parsons 377; Story on Bills § 148; Cooper v. Waldegrave, 2 Beav. 282; Jewell v. Wright, 30 N. Y. 259 (1864); Dickinson v. Edwards, 77 Ib. 573 (1879); Campbell v. Nichols, 14 Vr. 81 (1868); Freese v. Brownell, 6 Ib. 285

the note be negotiated elsewhere.¹ So, if a note is made in one State and intended to be paid in another, the latter fixes the rate of interest if not expressed.² But the interest after maturity will be computed at the rate fixed by the *lex fori*, not by that of the place of payment.³

In computing interest the foreign rate will be presumed to be the same as that of the forum.⁴ But if the contract would be usurious by the law of the forum, this will not be presumed to be the law of the place of contract.⁵

§ 42. **Damages—Exchange—Currency.**—The same law of place which determines what interest is to be paid, settles also the rule of damages for non-payment,⁶ as well as the

(1871); *Agricultural Nat. Bank v. Sheffield*, 4 Hun 421 (1875); *Hawley v. Sloo*, 12 La. An. 815; *Howard v. Branner*, 23 La. An. 369 (1871); *Arnold v. Potter*, 22 Iowa 194 (1867); *Newman v. Kershaw*, 10 Wis. 333 (1860). But a note made in Illinois in payment of a New York debt and payable in New York, although bearing a rate of interest valid in Illinois and usurious in New York, has been held valid in New York, *Sheldon v. Haxton*, 24 Hun 196 (1881); affirmed 91 N. Y. 12 (1883). So, too, the place of payment will control a bill drawn elsewhere, but made payable in such State for the purpose of getting the higher rate of interest of that place. *Smith v. Muncie Nat. Bank*, 29 Ind. 158 (1867). But a contract by letter written in England for services to be performed in Scotland would not come within this rule, *Arnott v. Redfern*, 2 C. & P. 88. See, however, *Isaacs v. McAndrews*, 1 Mont. 437 (1872).

¹*Jewell v. Wright*, 30 N. Y. 259 (1864); *Dickinson v. Edwards*, 77 *Ib.* 573 (1879); *Hackettstown Bank v. Rea*, 6 Lans. 455 (1872); S. C., 64 Barb. 175; affirmed 53 N. Y. 618 (1873); *Clayes v. Hooker*, 4 Hun 231; *Bank of Illinois v. Brady*, 3 McLean 263. But see, *contra*, *First Nat. Bank v. Morris*, 1 Hun 680 (1874), where an accommodation acceptance in New York, discounted in Massachusetts, was held to be governed by the law of the latter State. And see *Opdyke v. Merwin*, 13 Hun 401 (1878).

²*Austin v. Innes*, 23 Vt. 236 (1861).

³*Ives v. Farmers' Bank*, 2 Allen 236 (1861); *Ayer v. Tilden*, 15 Gray 178 (1860).

⁴*Cooper v. Reaney*, 4 Minn. 528 (1860); *Longee v. Washburn*, 16 N. H. 134 (1844); *Hawley v. Sloo*, 12 La. An. 815. But in *Sweet v. Dodge*, 4 Sm. & M. 667 (1845), it was held that no interest could be recovered without proof of the foreign rate. See, too, *Martin v. Martin*, 1 *Ib.* 176.

⁵*Martin v. Martin*, 1 Sm. & M. 176 (1843); *Engler v. Ellis*, 16 Ind. 475 (1861); *Pugh v. Cameron*, 11 W. Va. 523 (1877); *White v. Friedlander*, 35 Ark. 52 (1879). Sunday laws, however, avoiding a contract where the action is brought, have been presumed to be the law of the place of contract also, *Brimhall v. Van Campen*, 8 Minn. 13 (1862); *Sayre v. Wheeler*, 31 Iowa 112 (1870); *Hill v. Wilker*, 41 Ga. 449 (1871). But see, *contra*, *O'Rourke v. O'Rourke*, 43 Mich. 58 (1880).

⁶*Wharton on Confli. of Laws* § 512; *Story on Confli. of Laws* § 307; *Courtois v. Carpentier*, 1 Wash. C. C. 376 (1806); *Slacum v. Pomery*, 6 Cranch 221 (1810); *Hazelhurst v. Kean*, 4 Yeates 19 (1803); *Bank of United States v. United States*, 2 How. 711 (1844). And an indorsee's rights will not be

rate of exchange,¹ the exchange between place of payment and place of suit being taken into account.² And if the currency of the place of payment has depreciated since the contract was made, the holder may recover damages equivalent to its original value at the time of contracting.³

§ 43. **Usury—Election Between Different Rates.**—In determining whether a bill or note is usurious, the courts have leaned noticeably to decisions sustaining the instrument, if valid by the law of any place, whether of contract or of payment, and this somewhat in disregard of any general rule. If a different rate of interest is fixed by law in the place of contract and of payment, the parties may elect either rate to govern their contract.⁴ Thus, they may choose the rate of the place of payment, that being the higher;⁵ or the rate of the place of contract, if that is the higher.⁶ So,

affected by the laws of the original place of contract (a different place from that of indorsement) authorizing payment in bank bills, *Dundas v. Bowler*, 3 McLean 397 (1844).

¹*Lee v. Wilcocks*, 5 Serg. & R. 48 (1819); *Smith v. Shaw*, 2 Wash. C. C. 167 (1808); *Marburg v. Marburg*, 26 Md. 9, 20 (1866); *Grant v. Healey*, 3 Sumn. C. C. 523 (1839); *Cash v. Kennion*, 11 Ves. 314. And see English Bills of Exch. Act, 1882, § 72.

²*Scott v. Bevan*, 2 B. & Ad. 78; *Delegal v. Naylor*, 7 Bing. 460; *Ekins v. East India Co.*, 1 P. Wms. 395; *Cockerill v. Barber*, 16 Ves. 461.

³*Warder v. Arell*, 2 Wash. (Va.) 282.

⁴*Arnold v. Potter*, 22 Iowa 194 (1867); *Newman v. Kershaw*, 10 Wis. 333 (1860); *Smith v. Muncie Nat. Bank*, 29 Ind. 158 (1867); *Fitch v. Remer*, 8 Am. Law Reg. 654 (1860). In like manner a renewal note dated and payable in Illinois at a rate of interest valid there but usurious in New York whither it was sent by mail and where the original loan was made and the original note given payable in Illinois, has been enforced in the courts of New York as valid there, *Sheldon v. Haxtun*, 91 N. Y. 124 (1883).

⁵*Sharp v. Davis*, 7 Baxter 607 (1874). And where no place of payment was named but the payee was a citizen of another State and the interest stipulated for was at the rate allowed there, it was held that this was a contract payable there and valid, although it would have been usurious where made, *Brown v. Gardner*, 4 B. J. Lea 145 (1879). So, too, *Scott v. Perlee*, 39 Ohio St. 63 (1883).

⁶*Richards v. Globe Bank*, 12 Wis. 692 (1860); *Chapman v. Robertson*, 6 Paige 627 (1837); *Pratt v. Adams*, 7 Paige 615 (1839); *Peeks v. Mayo*, 14 Vt. 33 (1842); *Fisher v. Otis*, 3 Chand. 83 (1850); *Atwater v. Roelofson*, 4 Am. Law Reg. 549 (1855); *Vliet v. Camp*, 13 Wis. 198 (1860); 2 Kent 460; *Depau v. Humphreys*, 8 Mart. (N. S.) 1 (1829); *Balme v. Wombough*, 38 Barb. 352 (1862); *Bank of Georgia v. Lewin*, 45 Ib. 340 (1865). But to the effect that the rate agreed on must not exceed that of the place of payment, see *Andrews v. Pond*, 13 Pet. 77; *Thompson v. Ketcham*, 4 Johns. 285; *Robb v. Halsey*, 11 Sm. & M. 146.

where the rate of interest differs in the place of contract and the residence of the parties, they may elect the higher rate;¹ unless such choice is a mere cover for usury.²

§ 44. **Usury—Place of Contract.**—In the absence of an election, as a general rule, the *lex loci contractus* governs the question of usury; and in general, in determining whether a note is usurious the actual place of the contract is to be considered rather than the place where the papers were drawn or delivered. Thus, a note made in the District of Columbia in payment of a Pennsylvania note at a rate valid in Pennsylvania but usurious in the District of Columbia, has been held to be governed by Pennsylvania law and sustained as valid.³ So, too, a note payable in Alabama for a New York loan at a rate of interest usurious in New York, has been held to be governed by New York law and to be void for usury.⁴ So, an accommodation note made, dated and signed in Texas, but actually discounted and payable in New York, will be usurious if made so by New York law.⁵ And where an accommodation acceptance is given payable in Boston, but discounted in New York at a usurious rate, and void by New York law for usury, the acceptor will not be liable to a holder under a New York indorsement, though he holds security for his acceptance.⁶ If a note is made and signed in one State, but dated and discounted in another, the latter determines the question of usury.⁷ If dated and signed by

¹Story on Bills § 148; Story on Prom. Notes § 166; 2 Edwards § 1011; Wharton Conf. L. § 510; 2 Parsons 376, 378; Richards v. Globe Bank, 12 Wis. 692 (1860); Vliet v. Camp, 13 Ib. 198 (1860); Depau v. Humphreys, 10 Mart. 1 (1829); Balme v. Wombough, 38 Barb. 352 (1862). But where a loan is made in New York and a note for a usurious amount there given, it will not be valid, though payable in Alabama and valid by Alabama law, Hanrick v. Andrews, 9 Port. 9 (1839).

²2 Parsons 377.

³Rhawn v. Grant, 1 MacArth. 31 (1873). So, Wallis v. Lehman, 36 Ark. 569 (1880).

⁴Hanrick v. Andrews, 9 Port. 9 (1839).

⁵Conner v. Donnell, 55 Tex. 167 (1881).

⁶Akers v. Demond, 103 Mass. 318 (1869).

⁷Second Nat. Bank v. Smoot, 2 MacArth. 371 (1876). So, too, irrespective of the date, Davis v. Clemson, 6 McLean 622 (1855). And a note executed, dated and payable in New York, and mailed by the maker to Pennsylvania

one maker in Missouri and signed by another and delivered in Iowa, the Iowa usury law will govern it.¹ But if made and dated in Georgia and given in settlement of a Georgia contract, it will be governed by Georgia law, though signed by one maker in North Carolina.² If made in South Carolina at the rate which is lawful there, to be signed, and subsequently signed, by a surety in North Carolina, he will be liable for that rate, though higher than that of North Carolina.³

If it is valid where it bears date, it cannot be defeated by evidence that the money for which it was given was really loaned in another State, where the stipulated rate of interest would be illegal;⁴ so far at least as to affect a *bona fide* purchaser for value before maturity.⁵

§ 45. **Usury—Situs of Landed Security.**—The fact that a note or bill is secured by a mortgage of lands lying in another State will not take it out of the operation of the *lex loci contractus*, as we have already seen.⁶ But if the law of the place of contract would render the instrument void for usury, it may still be sustained if valid by the law of the

to renew his note held there by a Pennsylvania corporation, may be lawfully discounted by such corporation at a Pennsylvania rate which would be usurious in New York, *Wayne Co. Sav. Bank v. Low*, 81 N. Y. 566 (1880). But the mere fact that a note was given for a debt due to a citizen of another State, will not render it valid, if made, delivered and payable in New York and void by the usury laws of New York, *Merchants' Bank v. Southwick*, 19 Cent. L. J. 316 (N. Y. Sup. Ct. 1884).

¹ *Hart v. Wills*, 52 Iowa 56 (1879). But a note given in consideration of a Florida contract dated in Florida and drawn at a rate of interest valid in that State but usurious in New York, will not be held void by reason of its delivery in New York, *Berrien v. Wright*, 26 Barb. 208 (1857).

² *Findlay v. Hall*, 12 Ohio St. 610 (1861); *Davis v. Coleman*, 7 Ired. 424 (1847).

³ *Houston v. Potts*, 64 N. C. 33 (1870).

⁴ *Potter v. Tallman*, 35 Barb. 182 (1861).

⁵ *Towne v. Rice*, 122 Mass. 67 (1877).

⁶ *DeWolf v. Johnson*, 10 Wheat. 367 (1825); *Chase v. Dow*, 47 N. H. 405 (1867); *Andrews v. Torrey*, 1 McCart. 355 (1862); *Dolman v. Cook*, *Ib.* 58 (1861); *Mix v. Madison Ins. Co.*, 11 Ind. 117 (1858). Although void for usury by the law of the place of contract and valid by the *lex rei sitæ*, *Sands v. Smith*, 1 Neb. 108. But if the note is made payable in the same State where the security lies, the law of that State will regulate the rate of interest, *Little v. Riley*, 42 N. H. 109 (1861).

place where the land lies.¹ So, *a fortiori*, if the note is payable in the place where the lands lie.²

§ 46. **Usury—Place of Payment.**—On the other hand, it may be sustained as valid by the *lex loci solutionis*, though usurious by the law of the maker's residence and of the place where the lands lie.³ So, the *lex loci solutionis* will prevail against the *lex fori* to sustain a note usurious by the law of the latter place.⁴ And a note dated and payable in New York and discounted in New Jersey at a rate usurious there but valid in New York, is governed by New York law and is valid.⁵ We have seen, however, that a bill given in New York for a New York loan and usurious there will not be sustained against the acceptor in Massachusetts, though accepted and payable in Massachusetts and valid there.⁶ So, a note made and discounted in Pennsylvania under a Pennsylvania contract, but dated, indorsed and payable in New York, will be sustained as valid by the Pennsylvania law, though it would have been usurious by New York law.⁷

¹ *Stapleton v. Conway*, 3 Atk. 727; S. C., 1 Ves. 427; *Chapman v. Robertson*, 6 Paige 627 (1837). And this has been held to be the case without regard to the domicile of the parties, *Arnold v. Potter*, 22 Iowa 194 (1867); *Newman v. Kershaw*, 10 Wis. 333 (1860).

² *Little v. Riley*, 43 N. H. 109 (1861).

³ *Goodrich v. Williams*, 50 Ga. 425 (1873). So, if valid by the law of the maker's residence and where the land lies, but usurious by the law of the place of payment, *Thompson v. Edwards*, 85 Ind. 414 (1882).

⁴ *Lines v. Mack*, 19 Ind. 223 (1862).

⁵ *Hackettstown Bank v. Rea*, 64 Barb. 175 (1872); affirmed 53 N. Y. 618 (1873). So, the law of the place of payment has been held to govern and render void for usury the following instruments: A note drawn and payable in New York and discounted in Connecticut at a rate usurious in both States, *Jewell v. Wright*, 30 N. Y. 259 (1864); a bill accepted and payable in New York, discounted in Massachusetts at a rate usurious by New York law, *Hildreth v. Shepard*, 65 Barb. 265 (1873); an accommodation note dated and payable in New York, negotiated by the payee in Massachusetts at a rate usurious by New York law, *Dickinson v. Edwards*, 77 N. Y. 573 (1879), affirming 13 Hun 405, and distinguishing *Tilden v. Blair*, 21 Wall. 241, where the original intention was to negotiate the note in another State; a note dated, delivered and payable in New York and in renewal of a New York contract, but delivered at the payee's domicile in Connecticut, *Jacks v. Nichols*, 5 N. Y. 178 (1851), affirming 3 Sandf. Ch. 313.

⁶ *Akers v. Demond*, 103 Mass. 318 (1869). So, too, *Tilden v. Blair*, 21 Wall. 241 (1874).

⁷ *Wayne Co. Sav. Bank v. Low*, 81 N. Y. 566 (1880).

As to usury an acceptance is governed in general by the law of the place of payment, or, if accepted generally, by that of the acceptor's residence.¹ If a note is dated at the maker's residence and valid there, it will be presumed to be payable there, and therefore valid, though it would be usurious where it was actually made.²

§ 47. **Negotiability—What Law Governs.**—The negotiability of commercial paper is to be determined in general, not by the *lex fori*, but by the *lex loci contractus*,³ or the *lex loci solutionis*.⁴ If it is negotiable by the *lex mercatoria*, it is so *prima facie* by the law of the place of contract.⁵

But where there is a conflict as to the negotiability of the instrument between the place of making and that of payment and the law of the forum corresponds with that of either place, its courts have enforced that law.⁶ So, if the law of the place of indorsement is in conflict with that of the place where the note was made or the bill drawn, and the law of the forum agrees with either, its courts have enforced that law.⁷ And, *a fortiori*, where the *lex fori* agrees with the law both of the place of making and of payment, it will control the law of the place of indorsement as to the negotiability of the paper.⁸

¹Coffman v. Bank of Kentucky, 41 Miss. 212 (1866).

²Bullard v. Thompson, 35 Tex. 313 (1872).

³Elderkin v. Elderkin, 1 Root 139 (1789); Bowne v. Olcott, 2 Ib. 353; Goffe v. Billingham, Ib. 527. So, in Stix v. Mathews, 75 Mo. 96 (1881), an indorser was held discharged in the forum for want of the note being made payable at a bank in Indiana (the *locus contractus*) as required by the law of that State.

⁴Stix v. Mathews, 63 Mo. 371 (1876); State v. Cobb, 64 Ala. 127 (1879). And as to a bill payable in Massachusetts, this will be presumed to be the common law, *Ib.*

⁵Tyrrell v. Cairo, &c., R. R., 7 Mo. App. 294 (1879).

⁶*Lex loci contractus* and *lex fori* controlling *lex loci solutionis* in Howenstein v. Barnes, 9 Cent. L. J. 48 (Kans. Sup. Ct. 1879). *Lex loci solutionis* and *lex fori* controlling *lex loci contractus* in Freeman's Bank v. Ruckman, 16 Gratt. 126 (1860).

⁷*Lex loci contractus* and *lex fori* controlling the law of the place of indorsement in Roosa v. Crist, 17 Ill. 450 (1856), as to negotiability by delivery; and in Reddick v. Jones, 6 Ired. 107 (1845), as to negotiability in general. So, Story on Prom. Notes § 173; Story on Conf. Laws § 346. But see, *contra*, Clanton v. Barnes, 50 Ala. 260 (1873), as to transfer by a married woman. *Lex loci contractus* controlled by the law of the place of indorsement and of the forum in Grace v. Hannah, 6 Jones 94 (1858). So, 2 Parsons 353.

⁸President, &c., v. Minor, 9 Sm. & M. 544 (1848).

If the indorsement is in accordance with the law of the place of contract and of payment, although not valid by the law of the place of transfer, the acceptor will be liable where the bill was made, as in the case of a blank indorsement in France of an English accepted bill.¹

It is to be remembered, however, that the indorsement of a bill is a separate contract from the drawing and to be governed as other contracts are, by the law of the place where it is made.² And this principle applies to each separate indorsement and each may have a distinct *locus contractus*.³

§ 48. **Transfer—Form—Governed by what Law.**—The form of an indorsement is governed by the law of the original place of contract if that is also the forum, as in the case of a Bank of England note transferred by delivery in France, where such transfer is insufficient and afterward sued on in England.⁴ If the transfer is void both by the law of the place where the instrument was made and by that of the place where it was transferred, it will be void everywhere.⁵ On the other hand, there may be a valid transfer of an in-

¹ *Lebel v. Tucker*, L. R. 3 Q. B. 77 (1867); *Bradlaugh v. DeRin*, L. R. 5 C. P. 473 (1870), reversing L. R. 3 C. P. 538 (1868). But, *quære*, as to the indorser's liability in such case, *Lebel v. Tucker*, *supra*. And see *Trimby v. Vignier*, 1 Bing. N. C. 151; S. C., 6 C. & P. 25; 4 M. & S. 695; *Everett v. Vendryes*, 19 N. Y. 436 (1859). But one who draws a bill in a foreign country upon a New York corporation is liable in New York to one holding the bill under a blank indorsement made in such foreign country, although a blank indorsement is not sufficient to transfer title by the law of such country, *Everett v. Vendryes*, *supra*.

² 1 Edwards § 383; *Musson v. Lake*, 4 How. 262 (1846); *Slacum v. Pomery*, 6 Cranch 221 (1810); *Dundas v. Bowler*, 3 McLean 397 (1844); *Towne v. Smith*, 1 Woodb. & M. 115 (1845); *Cook v. Litchfield*, 9 N. Y. 279 (1853); S. C., 5 Sandf. 330; *Lennig v. Ralston*, 23 Penna. St. 137 (1854); *Trabue v. Short*, 18 La. An. 257 (1866); *Dow v. Russell*, 12 N. H. 49 (1841); *Williams v. Wade*, 1 Mete. 82 (1840); *Greathead v. Walton*, 40 Conn. 226 (1873); *Hunt v. Standart*, 15 Ind. 33 (1860); *Hyatt v. Bank of Kentucky*, 8 Bush 193 (1871); *Huse v. Hamblin*, 29 Iowa 501 (1870); *First Nat. Bank of Michigan v. Green*, 33 Iowa 140 (1871); *Rose v. Park Bank*, 20 Ind. 94 (1863); *Short v. Trabue*, 4 Mete. 299 (Ky. 1863); *Hatcher v. McMorine*, 4 Dev. 122 (1833); *Bernard v. Barry*, 1 Gr. 388 (Iowa 1848); *Burrows v. Hannegan*, 1 McLean 315; *McClintick v. Cummins*, 3 Ib. 158.

³ *Rose v. Park Bank*, 20 Ind. 94 (1863); *Carlisle v. Chambers*, 4 Bush 268 (1868).

⁴ *De la Chaumette v. Bank of England*, 2 B. & Ad. 385; S. C., 9 B. & C. 208. *quære*.

⁵ 2 Parsons 356.

strument which was illegal in the original place of contract because made between alien enemies.¹ If a note or bill is payable generally, and made to be negotiated in another State, the place of indorsement will govern the transfer.² So, the place of indorsement will control, although the note is expressly payable where it is made.³ In like manner a general assignment for the benefit of creditors will be good, if valid where made, and not contrary to the local law and policy of the forum, it having been made in the place of the assignor's residence.⁴

§ 49. **Transfer by Executor—Suit by Assignee.**—If by the law of the place of transfer a personal representative of a deceased holder can transfer an instrument so as to enable his transferee to bring suit, the transfer will carry the power of suit everywhere.⁵ So, it has been held that a foreign administrator holding a note payable to and indorsed by his intestate may sue on it subject to defenses existing against his intestate.⁶ And even where the law of the place of transfer does not allow the assignee to sue in his own name, he may generally do so, if permitted by the *lex fori*.⁷ But it seems that he could not sue in his own name by force of

¹ *Morrison v. Lovell*, 4 W. Va. 346 (1870).

² *Braynard v. Marshall*, 8 Pick. 194 (1829).

³ *Carlisle v. Chambers*, 4 Bush 268 (1868); *Short v. Trabue*, 4 Metc. 299 (Ky. 1863); *Trabue v. Short*, 18 La. An. 257 (1866); *Hyatt v. Bank of Kentucky*, 8 Bush 193 (1871); *Rose v. Park Bank*, 20 Ind. 94 (1863). So, of a bill payable generally but drawn on a person resident in another place from that of its transfer, *Powers v. Lynch*, 3 Mass. 77 (1807). But see *Van Zant v. Arnold*, 31 Ga. 210 (1860).

⁴ *Frazier v. Fredericks*, 4 Zab. 162 (1853). So, an assignment by act of law to the receiver of an insolvent corporation carries a note actually held and payable in the State where the receiver was appointed as against a subsequent attachment in the State where the maker resided, *Osgood v. Maguire*, 61 N. Y. 524 (1875). But a foreign assignment has been held ineffectual against an attachment of a debt payable in the place of the forum and attached there, *Goodsell v. Benson*, 13 R. I. 225 (1881); *Lewis v. Bush*, 30 Minn. 244 (1883).

⁵ *Daniel* 843; *Harper v. Butler*, 2 Pet. 239 (1829); *Andrews v. Carr*, 26 Miss. 577 (1853); *Grace v. Hannah*, 6 Jones 94 (1858); *Leake v. Gilchrist*, 2 Dev. 73 (1829). But, *contra*, *Thompson v. Wilson*, 2 N. H. 291 (1820); *Stearns v. Burnham*, 5 Me. 261 (1828).

⁶ *Barrett v. Barrett*, 8 Me. 353 (1832).

⁷ *Foss v. Nutting*, 14 Gray 484 (1860). Especially if the place of forum is also the place where the contract was made, *Lodge v. Phelps*, 1 Johns. Cas. 139; S. C., 2 Cai. 321.

the law of the place of transfer if not permitted so to sue by the law of the forum.¹

§ 50. **Bona Fide Holder—Admissibility of Defenses.**—Again, the *lex loci contractus*, and not the *lex fori*, determines whether a *bona fide* holder before maturity should be subject to a defense available against a prior holder.² The law of the place of transfer will not in general affect the maker's liability or his right to set up equitable defenses.³ But an accommodation acceptor will be governed by the law of the place where the bill is first negotiated, that being in reality the place of the original contract.⁴

§ 51. **Grace—What Law Governs.**—The law of the place of contract determines what grace, if any, is to be allowed, where a note is payable generally and therefore, *prima facie*, at the place where it was made.⁵ But if a bill or note is payable at a designated place, the law of that place will determine whether it is entitled to grace;⁶ and what this law is need not be known to the parties at the time.⁷

§ 52. **Demand—Protest—What Law Governs.**—The presentment of a note or bill is governed by the *lex loci solutionis*.⁸ And whether it can be made by a notary's clerk

¹Fisk v. Brackett, 32 Vt. 798 (1860). But see, *contra*, as to a non-negotiable note, Owen v. Moody, 29 Miss. 79 (1855).

²Harrison v. Edwards, 12 Vt. 648 (1840).

³Brabston v. Gibson, 9 How. 263 (1850); Wilson v. Lazier, 11 Gratt. 477 (1854); Stacy v. Baker, 2 Ill. 417 (1837); Yeatman v. Cullen, 5 Blackf. 241 (1839).

⁴Gallaudet v. Sykes, 1 MacArth. 489 (1874).

⁵Burnham v. Webster, 19 Me. 232 (1841). Although the note was afterward signed in Vermont by another joint maker, Bryant v. Edson, 8 Vt. 325 (1836); or was dated in another State, Blodgett v. Durgin, 32 Vt. 361 (1859).

⁶Chitty 376; 1 Edwards § 710; 2 Parsons 324 n.; Story on Bills § 334; Story on Notes § 216; Thorp v. Craig, 10 Iowa 461 (1860); Bowen v. Newell, 13 N. Y. 290 (1855); Skelton v. Dustin, 92 Ill. 49 (1879); Bank of Washington v. Triplett, 1 Pet. 25 (1828); Goddin v. Shipley, 7 B. Mon. 575 (1847); Dolfus v. Frosch, 1 Denio 367 (1845). So, English Bills of Exch. Act 1882 § 72. So, a certificate of deposit payable in New York city on Sunday, was held by the local usage of that place to be due without grace on Saturday, Kilgore v. Bulkley, 14 Conn. 362 (1841).

⁷2 Parsons 324 n.

⁸Ellis v. Commercial Bank, 7 How. 294 (Miss. 1843); 2 Edwards § 796; v. Perkins, 2 Mich. 235 (1851); and not by the *lex fori*, Byles 408. So, Pierce v. Insdeth, 16 Otto 546 (1882).

or must be made by the notary himself is to be determined by that law.¹ But the necessity of demand for payment after presentment for acceptance and refusal to accept is to be settled *as against the indorser* by the law of the place of indorsement.²

The law of the place of payment governs the protest of a bill or note as well as its presentment.³ And if that law requires the protest to be sealed, as in Alabama, it has been held inadmissible in evidence in the courts of another State without a seal.⁴ So, the notice of dishonor is governed by the *lex loci solutionis*.⁵ And this is true in England as regards the indorser, it being considered part of the indorser's contract.⁶ Thus, if notice of protest is not required by the law of Spain (where the bill is payable) on non-acceptance, an English indorser will be liable to his indorsee on receiving immediate notice from him after he had received notice, although such indorser received no notice of dishonor from the holder until twenty days after the maturity of the bill.⁷ But the authority of this rule has been questioned by Judge Story, and most American cases have held that the notice of dishonor is to be given according to the law of the place of indorsement,

¹McCane v. Fitch, 4 B. Mon. 600. So, presentment for acceptance and protest for non-acceptance, by the local usage where the drawee resides, Nelson v. Totterall, 7 Leigh 179 (1836). But this is contrary to the general rule, Onondaga Bank v. Bates, 3 Hill 53. In such case the foreign usage must be proved, McCane v. Fitch, *supra*; Chenoweth v. Chamberlin, 6 B. Mon. 60 (1845).

²Story on Notes § 171; Aymar v. Sheldon, 12 Wend. 439 (1834); Powers v. Lynch, 3 Mass. 77 (1807).

³2 Parsons 336; Ellis v. Commercial Bank, 7 How. 294 (Miss. 1843); Chatham Bank v. Allison, 15 Iowa 357 (1863); Carter v. Union Bank, 7 Humph. 547 (1847); Snow v. Perkins, 2 Mich. 238 (1851); Simpson v. White, 40 N. H. 540 (1860); Ross v. Bedell, 5 Duer 462 (1856). See, too, *In re Pulisier*, 14 Fed. Rep. 247 (1880). And see English Bills of Exch. Act 1882 § 72.

⁴Ticknor v. Roberts, 11 La. 14 (1837).

⁵Byles 408; 2 Edwards § 796; Mathewson v. Carman, U. C. 1 Q. B. 259 (1843); irrespective of the indorser's residence, Smith v. Hall, U. C. 3 Q. B. 315 (1847).

⁶Rothschild v. Currie, 1 Q. B. 43 (1841); Hirschfeld v. Smith, L. R. 1 C. P. 340 (1866). So, too, where time for demand, protest and notice have been extended on account of the outbreak of war by law of such place of payment passed after the bill was drawn and before its maturity, Rouquette v. Overman, L. R. 10 Q. B. 525 (1875).

⁷Horne v. Rouquette, L. R. 3 Q. B. D. 514 (1878).

so far as it concerns the indorser.¹ And where no place of payment is designated, the indorser will be entitled to notice of dishonor if it is required by the *lex loci contractus*.²

§ 53. **Remedy—Governed by Lex Fori.**—The remedy and its form are governed, of course, by the *lex fori*.³ And as to this, the foreigner must take the law, where he brings his action, as he finds it.⁴ The *lex fori* determines the extent of the remedy;⁵ as well as the form of action, *e. g.* debt or assumpsit;⁶ and the jurisdiction of its own courts.⁷ So, too, the method of process, by arrest or otherwise, is a question for the *lex fori* to determine.⁸

§ 54. **Limitation of Action—What Law Governs.**—The time within which an action shall be brought is also a question for the *lex fori*.⁹ And an action may be brought by the *lex*

¹Story on Bills § 285; Story on Notes § 177; *Snow v. Perkins*, 2 Mich. 238 (1851); *Simpson v. White*, 40 N. H. 540 (1860). And see § 38, *supra*.

²*Wright v. Andrews*, 70 Me. 86 (1879), the place of making the contract requiring in this case notice to be given to an indorser in blank.

³Wharton Conf. Laws § 747; Byles 407; 1 Daniel 842; 1 Edwards 220; 2 Parsons 366; *Don v. Lippmann*, 5 Cl. & Fin. 1; *Melan v. Fitzjames*, 1 Bos. & P. 138; *Porter v. Munger*, 22 Vt. 191 (1850); *Douglas v. Oldham*, 6 N. H. 150 (1833); *Scoville v. Canfield*, 14 Johns. 338 (1817); *Bank of the United States v. Donnally*, 8 Pet. 361 (1834); *Van Reimsdyke v. Kane*, 1 Gall. 371 (1812); *Smith v. Spinolla*, 2 Johns. 198 (1807); *Taberrer v. Brentnall*, 3 Harr. 262, 265 (1841); *Garr v. Stokes*, 1 Harr. 403, 405 (1838); *Gulick v. Loder*, 1 Gr. 68 (1832); *Bulger v. Roche*, 11 Pick. 36, 38 (1831); *Goodman v. Munks*, 8 Port. (Ala.) 84 (1838); *Davis v. Morton*, 5 Bush 160 (1869); *Armour v. McMichael*, 7 Vr. 92, 94 (1872); *Varick v. Crane*, 3 Gr. Ch. 128 (1837); *Grimshaw v. Bender*, 6 Mass. 157 (1809); *Burrows v. Hannegan*, 1 McLean 315.

⁴Wharton Conf. Laws § 529; 1 Daniel 842; *De la Vega v. Vianna*, 1 B. & Ad. 284 (1830); *Taberrer v. Brentnall*, 3 Harr. 262 (N. J. 1841); and this applies to the citizens of the different States, *Williams v. Haines*, 27 Iowa 251 (1869).

⁵*Hinkley v. Marean*, 3 Mason 88 (1822); *Trasher v. Everhart*, 3 Gill & J. 234 (1831); *Steele v. Curle*, 4 Dana 381 (1836); *Porter v. Munger*, 22 Vt. 191, 197 (1850). But see, *contra*, *Urton v. Hunter*, 2 W. Va. 83 (1867).

⁶1 Daniel 844; *Bank of United States v. Donnally*, 8 Pet. 361 (1834); *Le Roy v. Beard*, 8 How. 451 (1850); *Williams v. Haines*, 27 Iowa 251 (1869); *Andrews v. Herriot*, 4 Cow. 508 (1825), overruling *Meredith v. Hinsdale*, 2 Caines 362 (1805); *Warren v. Lynch*, 5 Johns. 239 (1810); *Steele v. Curle*, 4 Dana 381 (1836). And see *Trasher v. Everhart*, 3 Gill & J. 234 (1831).

⁷*Hunt v. Hunt*, 72 N. Y. 217 (1878).

⁸Byles 407; *De la Vega v. Vianna*, 1 B. & Ad. 284, overruling *Melan v. Fitzjames*, 1 Bos. & P. 138; *Shaw v. Harvey*, M. & M. 526.

⁹Byles 407; 1 Edwards § 220; 2 Parsons 385; 1 Daniel 843; *British Linen Co. v. Drummond*, 10 B. & C. 903; *Mineral Point R. R. Co. v. Banon*, 83 Ill. 365 (1876); *Taberrer v. Brentnall*, 3 Harr. 262, 265 (N. J. 1841); *Jones v. Hook*, 2 Rand. 303 (1824); *Pearsall v. Dwight*, 2 Mass. 84, 89 (1806); *Miller v.*

fori, although it has not accrued yet by the *lex loci contractus*.¹ So far as statutes of limitation are mere laws of procedure the *lex fori* governs the case;² but if the statute goes to the extinguishment of the right itself, the *lex loci contractus* may be the rule that controls.³ The courts of one State may entertain an action that would be barred by the law of another (the place of contract), if the statute of limitations has never attached in the former State.⁴ But if an action is barred by the statute of limitations in the place of the debtor's domicile, the courts of another State will generally treat it as barred in their State also;⁵ although the statute never began to run at the forum, and the debtor who never resided there appeared to be excepted from the bar of the statute as a non-resident.⁶

Brenham, 68 N. Y. 83 (1877); *Urton v. Hunter*, 2 W. Va. 83 (1867); *Hogett v. Emerson*, 8 Kans. 262 (1871); *Smith v. Spinolla*, 2 Johns. 198 (1807); *Ruggles v. Keeler*, 3 *Ib.* 261 (1808); *Peck v. Hozier*, 14 *Ib.* 346 (1817); *Decouche v. Savetier*, 3 Johns. Ch. 190 (1817); *Gans v. Frank*, 36 Barb. 320 (1862); *Power v. Hathaway*, 43 Barb. 214 (1864); *Paine v. Drew*, 44 N. H. 306 (1862); *Thibodeau v. Levassuer*, 36 Me. 362 (1853); *Medbury v. Hopkins*, 3 Conn. 479 (1820); *Bruce v. Luck*, 4 Gr. 143 (Iowa 1853); *Nash v. Tupper*, 1 Cal. 402 (1803); *Lincoln v. Battelle*, 6 Wend. 475 (1831); *Fletcher v. Spaulding*, 9 Minn. 64 (1864); *Brown v. Stone*, 4 La. An. 235 (1849); *Murray v. Fisher*, 5 Lans. 98 (1871). Especially where it is also the defendant's domicile, and that irrespective of the plaintiff's domicile being in another State, *Fletcher v. Spaulding*, *supra*.

¹ *Clark v. Conner*, 2 Strobb. 346 (1847).

² Wharton on Conf. of Laws § 535; *Williams v. Jones*, 13 East 439 (1811); *Huber v. Stiner*, 2 Bing. N. C. 202; *Don v. Lippmann*, 5 Cl. & Fin. 1 (1837); *Ruckmaboye v. Mottichund*, 8 Moo. P. C. 4; *De la Vega v. Vianna*, 1 B. & Ad. 284 (1830); *British Linen Co. v. Drummond*, 10 B. & C. 903 (1830); *Van Reimsdyke v. Kaue*, 1 Gall. 371 (1812); *Le Roy v. Crowninshield*, 2 Mason 151 (1820); *Hinkley v. Marean*, 3 *Ib.* 88 (1822); *Titus v. Hobart*, 5 *Ib.* 378 (1829); *Bank of the United States v. Donnally*, 8 Pet. 361 (1834); *M'Elmoyle v. Cohen*, 13 *Ib.* 312 (1839); *Pearsall v. Dwight*, 2 Mass. 84 (1806); *Woodbridge v. Wright*, 3 Conn. 523 (1821); *Atwater v. Townsend*, 4 *Ib.* 47 (1821).

³ Byles 407; 1 Daniel 844; 2 Parsons 385; Lord Ellenborough, C. J., in *Williams v. Jones*, 13 East 439. See, too, *Huber v. Steiner*, 2 Bing. N. C. 202; *Don v. Lippmann*, 5 Cl. & Fin. 1; *Harris v. Quine*, L. R. 4 Q. B. 653.

⁴ *Power v. Hathaway*, 43 Barb. 214 (1864); *Bulger v. Roche*, 11 Pick. 36 (1831); *Putnam v. Dike*, 13 Gray 535 (1859); *Estes v. Kyle*, Meigs 34 (1838); *Byrne v. Crowninshield*, 17 Mass. 55 (1820); *Brown v. Parker*, 28 Wis. 21 (1871); *contra*, *Harrison v. Stacy*, 6 Rob. 15 (1843); *Goodman v. Munks*, 8 Port. 84 (1838).

⁵ *Wernse v. Hall*, 101 Ill. 423 (1882).

⁶ *Beardsley v. Southmayd*, 3 Gr. 171 (N. J.); *Taberrer v. Brentnall*, 3 Harr. 262 (N. J. 1841); *Wood v. Leslie*, 6 Vr. 472 (1872). See, too, *Hale v. Lawrence*, 1 Zab. 741 (1848); *Howe v. Lawrence*, 2 *Ib.* 107. But see *Ridge v. Cowley*, 6 B. J. Lea 166 (1880), where the payee's residence was the place of the action, and

The statute of limitation of the forum will be enforced, although by the law of the place of contract there is a different limitation proved.¹ So, too, although the place of contract has no such statute.² On the other hand, the *lex fori* will not permit a judgment of the courts of another State to be enforced within its limits against the bar of its own statute, but will restrain such suit by perpetual injunction.³

§ 55. **Parties—Evidence—What Law Governs.**—Who is the proper person to bring an action is to be determined by the *lex fori*.⁴ Thus, the *lex fori* may require an assignor who has transferred a bill without indorsement, to bring the action in his own name, although the *lex loci contractus* requires that the action be brought by the real party in interest.⁵

So, the *lex fori* determines the competency of a witness.⁶ And the incompetency of a witness in another State by reason of his conviction for crime in that place does not affect him, unless he is rendered incompetent by the *lex fori* also.⁷

The admissibility of evidence is also a question for the *lex fori*, *e. g.* admissibility of parol evidence to explain a blank indorsement.⁸ So, the admissibility of a foreign certificate of protest to prove demand and notice of dishonor.⁹ So, a note which is not admissible in the courts of the place of contract for want of a stamp required by the local law (but not made void for want of such stamp), may still be ad-

the Tennessee statute was held to run only from the debtor's removal into Tennessee, although the debt was then barred by the *lex loci contractus*.

¹ *British Linen Co. v. Drummond*, 10 B. & C. 903. So, *Jones v. Hook*, 2 Rand. 303 (1824), decided under the Virginia statute.

² *Nicolls v. Rodgers*, 2 Paine 437 (1827); *Pearsall v. Dwight*, 2 Mass. 84, 90 (1806). And the United States courts apply the statute of limitations of the State in which they are sitting, *Nicolls v. Rodgers*, *supra*.

³ *Brown v. Parker*, 28 Wis. 21 (1871).

⁴ *Wharton on Conf. Laws* § 457; 1 *Daniel* 843; 2 *Parsons* 368; *Bradlaugh v. DeRin*, L. R. 5 C. P. 473 (1870), reversing L. R. 3 C. P. 533; *Mayhew v. Pentecost*, 129 Mass. 332 (1880). See, too, *O'Callaghan v. Thomond*, 3 Taunt. 82; *Fisk v. Brackett*, 32 Vt. 798 (1860).

⁵ *Foss v. Nutting*, 14 Gray 484 (1860).

⁶ 1 *Daniel* 846; *Wharton Conf. Laws* § 768; *Story Conf. Laws* § 635; *Bain v. Whitehaven, &c., Junction Ry. Co.*, 3 H. L. Cas. 1.

⁷ *Sims v. Sims*, 75 N. Y. 466 (1878).

⁸ *Downer v. Chesebrough*, 36 Conn. 39.

⁹ *Kirtland v. Wanzer*, 2 Duer 278 (1853).

missible elsewhere.¹ But if the question is as to the effect of the evidence, it is said that the law of the place of contract should prevail.² The English courts have, however, refused to admit in evidence a verbal contract, made in France and valid there, but void in England by the statute of frauds.³

§ 56. **Damages—Interest—Exchange—Set-Off.**—The damages to be recovered, like interest, are in general to be determined by the *lex loci contractus*.⁴ But courts will not enforce the law of a foreign place of contract authorizing deduction as a penalty for usury of triple the sum taken.⁵

What law shall determine the rate of interest after maturity has been variously decided. Thus, it has been held that in this respect the law of the forum and place of contract yields to that of the place of payment;⁶ that the law of the place of contract yields to that of the forum and place of payment;⁷ and that the law of the place of payment and contract yields to that of the forum.⁸

The currency, weights and measures intended will be determined by the *lex loci solutionis*.⁹ The existing rate of exchange also forms part of the holder's recovery.¹⁰ But this

¹ *Fant v. Miller*, 17 Gratt. 47 (1866); *Lambert v. Jones*, 2 Patt. & H. 144 (1856).

² *Mason v. Dousay*, 35 Ill. 424 (1864).

³ *Leroux v. Brown*, 12 C. B. 801.

⁴ Story on Conf. Laws § 307; 2 Parsons 372; Wharton on Conf. Laws § 512; *Courtois v. Carpentier*, 1 Wash. C. C. 376 (1806); *Slacum v. Pomery*, 6 Cranch 221 (1810); *Bank of United States v. United States*, 2 How. 711 (1844); *Hazellhurst v. Kean*, 4 Yeates 19 (1803). The drawer is governed by the law of the place of drawing, *Astor v. Benn*, 1 Stuart 69 (Canada 1812); *Gibbs v. Freemont*, 9 Exch. 25; the indorser by that of indorsing, *Slacum v. Pomery*, *supra*. So, the acceptor is governed as to the rate of interest and damages by the law of the place where the bill was drawn, although different from the law of his domicile, *Raymond v. Holmes*, 11 Tex. 54 (1853); *Bailey v. Heald*, 17 *Ib.* 102 (1856). But see, *contra*, *Abel v. McMurray*, 10 *Ib.* 350 (1853).

⁵ *Wright v. Bartlett*, 43 N. H. 548 (1862).

⁶ *Peck v. Mayo*, 14 Vt. 33 (1842).

⁷ *Healy v. Gorman*, 3 Gr. 328 (N. J. 1836).

⁸ *Ives v. Farmers' Bank*, 2 Allen 236 (1861).

⁹ Wharton on Conf. Laws §§ 437, 514; Story on Conf. Laws §§ 270, 308; *Benners v. Clements*, 58 Penna. St. 24 (1868); *Rosseter v. Cahlmann*, 8 Exch. 361 (1853).

¹⁰ Story on Conf. Laws § 309; Wharton on Conf. Laws § 515; *Cash v.*

has been fixed at times by statute, which will in such case control the market rate.¹

On the other hand, the *lex fori* determines what defenses are admissible (so far as they are not expressly excluded by the contract itself),² and regulates all questions of set-off,³ and pleas of want of consideration.⁴ But if a payment made before maturity is no defense against a *bona fide* holder for value before maturity by the *lex loci contractus*, that law will control the law of the forum and exclude the defense.⁵

§ 57. **Discharge—Payment—What Law Governs.**—The same law that determines the validity and construction of a contract determines in general what will avail to discharge the parties.⁶ If a discharge is good by the *lex loci solutionis*, it is sufficient everywhere.⁷ But if it is valid neither by the law of the place of contract or of payment, it will only avail in the place where it was granted.⁸ If the law of the place

Kennion, 11 Ves. 314; *Smith v. Shaw*, 2 Wash. C. C. 167 (1808); *Lee v. Wilcocks*, 5 Serg. & R. 48 (1819); *Marburg v. Marburg*, 26 Md. 9 (1866); *Grant v. Healey*, 3 Sumn. 523 (1839).

¹Wharton on Confl. of Laws § 516; Story on Notes § 163; *Schofield v. Day*, 20 Johns. 102 (1822); *Adams v. Cordis*, 8 Pick. 260 (1829). But the actual rate may be allowed as damages, *Adams v. Cordis*, *supra*.

²*Stevens v. Norris*, 30 N. H. 466 (1855); *Green v. Sarmiento*, 3 Wash. C. C. 17 (1811).

³Byles 408; 1 Edwards § 220; 2 Parsons 375; 1 Daniel 847; Story on Confl. Laws § 575; *Gibbs v. Howard*, 2 N. H. 296 (1820); *Bank of Gallipolis v. Trimble*, 6 B. Mon. 599 (1846); *Mineral Point R. R. Co. v. Barrow*, 83 Ill. 365 (1876). But see *Bliss v. Houghton*, 13 N. H. 126 (1842), where a note made, indorsed and payable in Vermont was held not to be subject to the set-off of a note of the payee purchased by the maker of the first note before its transfer, the purchaser of the first note having no knowledge of the set-off and the law of Vermont governing the case.

⁴*Williams v. Haines*, 27 Iowa 251 (1869).

⁵*Harrison v. Edwards*, 12 Vt. 648 (1840).

⁶*Stevens v. Norris*, 30 N. H. 466 (1855); *Green v. Sarmiento*, 3 Wash. C. C. 17 (1811).

⁷Story on Notes § 168; Story on Confl. Laws § 331; 2 Parsons 359.

⁸Byles 404; 2 Parsons 360; 1 Daniel 837; Story on Bills § 165; Story on Prom. Notes § 168; *Bartley v. Hodges*, 30 L. J. Q. B. 352; *Smith v. Buchanan*, 1 East 6; *McMillan v. McNeil*, 4 Wheat. 122, 209; *Ogden v. Saunders*, 12 Ib. 213 (1827); *Green v. Sarmiento*, Pet. C. C. 74 (1810); *Smith v. Smith*, 2 Johns. 235 (1807); *Sherrill v. Hopkins*, 1 Cow. 103 (1823); *Pratt v. Chase*, 44 N. Y. 597 (1871); *Frey v. Kirk*, 4 Gill & J. 509 (1832); *Betts v. Bagley*, 12 Pick. 572 (1832); *Baldwin v. Hale*, 1 Wall. 223 (1863); *Urton v. Hunter*, 2 W. Va. 83 (1807). Scotch bankruptcy discharges form an exception to this rule by force of the statute in England, Byles 404; *Smith v. Buchanan*, *supra*; *Phillips v. Allan*, 8 B. & C. 477.

of payment makes part payment a discharge, it will be a sufficient discharge everywhere.¹ So, the sufficiency of payment by a note or bill is to be determined by the law of the place of payment.² But it has been held that the effect of a payment made in another State must be determined by the law of that State rather than of the place of contract or of the forum.³ Exemptions from levy and sale are questions for the *lex fori*.⁴

§ 58. **Insolvency Discharge—What Law Governs.**—An insolvent's discharge by the law of another State will be recognized everywhere as binding on the citizens of that State;⁵ and upon their subsequent assignees.⁶ So, if a bill drawn abroad upon an English house and payable to a foreign payee is after non-acceptance discharged as to the foreign drawer by the law of his place of contract, he will be discharged in an action brought against him by the payee in England.⁷ Such a discharge will also be binding on a party to the contract, who was (at the time the contract was made) a citizen of the State where the discharge was granted, but who moved into another State before the discharge took place.⁸

But such discharge will not be binding upon the citizens

¹ Byles 403; *Ralli v. Dennistonn*, 6 Exch. 483.

² Story on Notes § 168; *Bartsch v. Atwater*, 1 Conn. 409 (1815). So, a bill payable in France is governed by the law of France as to the sufficiency of payment in *assignats*, *Searight v. Calbraith*, 4 Dall. 325.

³ *Winslow v. Brown*, 7 R. I. 95 (1861).

⁴ *Mineral Point R. R. Co. v. Barrow*, 83 Ill. 365 (1876).

⁵ 2 Parsons 361; *Wharton* on Conf. Laws § 524; *Ogden v. Saunders*, 12 Wheat. 213 (1827); *Stone v. Tibbetts*, 26 Me. 110 (1846); *Stevens v. Norris*, 30 N. H. 466 (1855); *Brigham v. Henderson*, 1 Cush. 430 (1848); *Smith v. Parsons*, 1 Ohio 236 (1823); *Stoddard v. Harrington*, 100 Mass. 87 (1868); *Einer v. Beste*, 32 Mo. 240 (1862); *Boyle v. Zacharie*, 6 Pet. 348; S. C., *ib.* 635 (1832); *Towne v. Smith*, 1 Woodb. & M. 115 (1845). *Contra*, *Farmers' and Mechanics' Bank v. Smith*, 6 Wheat. 131 (1821); *Sturges v. Crowninshield*, 4 *ib.* 122 (1819).

⁶ *Baker v. Wheaton*, 5 Mass. 509 (1809).

⁷ Byles 403; 1 Edwards § 538; *Potter v. Brown*, 5 East 124; *Hicks v. Brown*, 12 Johns. 142 (1815).

⁸ *Stoddard v. Harrington*, 100 Mass. 87 (1868). And the drawer of such bill, being afterward discharged as a bankrupt by the laws of the country where the bill was drawn and where both drawer and payee lived, is not liable in the country where it was presented for acceptance upon its non-acceptance there, *Potter v. Brown*, 5 East 124.

of another State, even though the contract was made in the State where the discharge was granted;¹ or was made in the State discharging it, payable generally;² or although the bill, from which discharge is sought, was drawn and accepted in the discharging State and payable generally;³ or was drawn in the place of the forum payable in the State where it was discharged.⁴ But if made and payable in the place where it was discharged, it has been held to be a sufficient discharge;⁵ especially if the person discharged was a citizen of that State.⁶ But a discharge under insolvent laws will have no effect on the citizens of another State, if the contract was neither made or to be performed in the State discharging it.⁷ It will, however, be binding on foreign citizens who assent to it by participating in dividends under it.⁸

Every *assignment* of a contract is a new contract and the assignee takes it free from the defense arising out of such discharge in the place where the original contract was made.⁹

¹ *Whitney v. Whiting*, 35 N. H. 457 (1857); *Braynard v. Marshall*, 8 Pick. 194 (1829); *Ogden v. Saunders*, 12 Wheat. 213, 358 (1827); *McMillan v. McNeil*, 4 *Ib.* 209 (1819); *Watson v. Bowne*, 10 Mass. 337 (1813); *Agnew v. Platt*, 15 Pick. 417 (1834); *Glenn v. Humphreys*, 4 Wash. C. C. 424 (1823); *Hobblethwaite v. Battins*, 1 Miles 82 (1835); *White v. Canfield*, 7 Johns. 117 (1810); *Peck v. Hozier*, 14 *Ib.* 346 (1817); *Baldwin v. Hale*, 1 Wall. 223 (1863); *Chase v. Flagg*, 48 Me. 182 (1859); *James v. Allen*, 1 Dall. 188 (1788); *Felch v. Bugbee*, 48 Me. 9 (1859); *Smith v. Smith*, 2 Johns. 235 (1807); *Hibernia Nat. Bank v. Lacombe*, 84 N. Y. 367 (1881). But see *Blanchard v. Russell*, 13 Mass. 1 (1816).

² *Green v. Sarmiento*, 3 Wash. C. C. 17 (1811); *Isley v. Merriam*, 7 Cush. 242 (1851); *Clark v. Hatch*, *Ib.* 455 (1851).

³ *Whitney v. Whiting*, 35 N. H. 457 (1857).

⁴ *Donnelly v. Corbett*, 7 N. Y. 500 (1852).

⁵ *Betts v. Bagley*, 12 Pick. 572 (1832); *Brown v. Collins*, 41 N. H. 405 (1860); *Stone v. Tibbetts*, 26 Me. 110 (1846).

⁶ *Scribner v. Fisher*, 2 Gray 43 (1854); *Blanchard v. Russell*, 13 Mass. 1 (1816); overruled by *Baldwin v. Hale*, 1 Wall. 223 (1863). But see *Kelley v. Drury*, 9 Allen 27 (1864).

⁷ *Palmer v. Goodwin*, 32 Me. 535 (1851); *Stevenson v. King*, 2 Cliff. 1 (1861); *Savoie v. Marsh*, 10 Metc. 594 (1846); *Fiske v. Foster*, *Ib.* 597 (1846); *Braynard v. Marshall*, 8 Pick. 194 (1829); *Sherrill v. Hopkins*, 1 Cowen 103 (1823); *Smith v. Smith*, 2 Johns. 235, 241 (1807); *Beer v. Hooper*, 32 Miss. 246 (1856); *Cook v. Moffat*, 5 How. 295 (1847); *Ogden v. Saunders*, 12 Wheat. 213 (1827); *Boyle v. Zacharie*, 6 Pet. 348; S. C., *Ib.* 635 (1832).

⁸ *Wharton on Confl. Laws* § 524; 1 *Edwards* § 538; *Clay v. Smith*, 3 Pet. 411 (1830); *Gardner v. Oliver Lee's Bank*, 11 Barb. 558 (1852); *Phelps v. Borland*, 30 Hun 362 (1863).

⁹ *Potter v. Kerr*, 1 Md. Ch. 275 (1848); *Easterly v. Goodwin*, 35 Conn. 279 (1868); *Very v. McHenry*, 29 Me. 206 (1848); *Banks v. Greenleaf*, 6 Call. 271

So, the indorsee of a bill or note will not be affected by a foreign discharge, though granted where the contract was originally made.¹ So, where a bill drawn and indorsed in France but accepted and payable in England has been canceled by mistake, and the parties decreed to be discharged in France, the indorser will still be held liable in England to his indorsee.²

In like manner, an *acceptance* is a new contract and will not be discharged by an insolvent discharge granted under the law of the place of original contract.³ But a foreign discharge of the drawer in the place of acceptance will be enforced by injunction in England in the acceptor's defense.⁴

Where the action is brought in the place of contract, its law will determine *as to that forum* the validity of an insolvent discharge, and not the law of the party's domicile.⁵ So, on this question, the law of the forum (which was also the place of payment) will control the law of the place of contract and of date.⁶

§ 59. **Foreign Statutes as to Conflict of Laws.**—It is provided by statute in some States that the *lex loci contractus* of foreign contracts shall govern them.⁷ But some of them ex-

(1799); *Worthington v. Jerome*, 5 Blatch. 279 (1865). But see, *contra*, *Parkinson v. Scoville*, 19 Wend. 150 (1838).

¹ *Wharton on Confl. Laws* § 523; *Baldwin v. Hale*, 1 Wall. 223 (1863); *Munroe v. Guillaume*, 3 Keyes 30 (1866); *Poe v. Duck*, 5 Md. 1 (1853); *Frey v. Kirk*, 4 Gill & J. 509 (1832); *Gilman v. Lockwood*, 4 Wall. 409 (1866); *Woodhull v. Wagner*, Baldw. 296 (1831); *Springer v. Foster*, 2 Story 383 (1843); *Towne v. Smith*, 1 Woodb. & M. 115 (1845); *Bancher v. Fisk*, 33 Me. 316 (1851); *Urton v. Hunter*, 2 W. Va. 83 (1867); *Houghton v. Maynard*, 5 Gray 552 (1856); *Produce Bank v. Farnum*, 5 Allen 10 (1862). See, too, *Brighton Bank v. Merick*, 11 Mich. 405 (1863); *Anderson v. Wheeler*, 25 Conn. 603 (1857).

² *Novelli v. Rossi*, 2 B. & Ad. 757.

³ *Lewis v. Owen*, 4 B. & Ald. 654.

⁴ *Byles* 403; *Burrows v. Jemimo*, 2 Stra. 733. And see *Wynne v. Calendar*, 1 Russ. 295.

⁵ *Sherrill v. Hopkins*, 1 Cow. 103 (1823), overruling *Penniman v. Meigs*, 9 Johns. 325 (1812), so far as it held that a discharge under the *lex fori* would govern in that forum all contracts *wherever made*.

⁶ *Cook v. Moffat*, 5 How. 295 (1846).

⁷ *Argentine Republic* (1862 Code Com. Art. 914); *Austria* (1850 Exch. Law Art. 85); *Brazil* (1850 Code Com. Art. 424); *Germany* (1848 Exch. Law Art. 85); *Nicaragua* (1869 Code Com. Art. 269); *Sweden* (1851 Exch. Law § 82); *Switzerland* (Exch. Laws, Basle 1863, Berne 1859 § 94); *Uruguay* (1865 Code Com. Art. 931).

cept contracts between subjects of the enacting State, who are to be governed by their home law.¹ Some States provide that the *lex loci contractus* shall govern as to demand, acceptance, payment, protest, notice of dishonor and formal requisites of bills and notes.² Others provide that formal defects under the *lex loci contractus* in a foreign bill shall be no defense against a subsequent domestic indorsement.³ The Spanish law subjects Spanish bills payable abroad to the law of the place of payment as to demand and protest.⁴ The Swiss law permits the law of a foreign domicile to determine whether the party to a contract is legally capable of contracting.⁵ While the German and Swedish laws permit questions of capacity to be governed by the foreign law of the domicile, unless the contract is made in their own territory and the parties are capable by its law.⁶ Questions of procedure are, however, to be determined by the *lex fori*.⁷

¹*Austria* (1850 Exch. Law Art. 85); *Denmark* (1825 Exch. Law § 9); *Germany* (1848 Exch. Law Art. 85); *Sweden* (1851 Exch. Law Art. 82).

²*Argentine Republic* (1862 Code Com. Art. 914); *Austria* (1850 Exch. Law Art. 85); *Brazil* (1850 Code Com. Art. 424); *Germany* (1848 Exch. Law Art. 85); *Nicaragua* (1869 Code Com. Art. 269); *Sweden* (1851 Exch. Law § 82); *Switzerland* (Basle 1863 Exch. Law § 94); *Berne* (1859 Exch. Law § 94); *Uruguay* (1865 Code Com. Art. 931).

³*Argentine Republic* (1862 Code Com. Art. 914); *Austria* (1850 Exch. Law Art. 85); *Germany* (1848 Exch. Law Art. 85); *Sweden* (1851 Exch. Law § 82); *Uruguay* (1865 Code Com. Art. 931).

⁴*Colombia* (1853 Code Com. Art. 440); *Spain* (1829 Code Com. Art. 486).

⁵*Switzerland* (Exch. Laws, 1859 Berne, 1863 Basle § 93).

⁶*Austria* (1850 Exch. Law Art. 84); *Germany* (1848 Exch. Law Art. 84); *Sweden* (1851 Exch. Law Art. 81).

⁷*Austria* (1850 Exch. Law Art. 86); *Germany* (1848 Exch. Law Art. 86); *Sweden* (1851 Exch. Law Art. 80); *Switzerland* (Exch. Laws, 1859 Berne, 1863 Basle § 95).

CHAPTER III.

FORMAL REQUISITES.

*I. Writing and Signature.**II. Sealed Instruments.**III. Date.*

I. WRITING, SIGNATURE AND ATTESTATION.

- 60. Writing and Printing.
- 61. Material.
- 62. Signature—Necessary.
- 63. What Name.
- 64. Seal—Mark—Stamp—Printing.
- 65. Position.
- 66. Irregular Indorsements.
- 67. Pleading—Evidence.
- 68. Attestation—Statutes.
- 69. Proof of Attesting Witness.

§ 60. **Writing and Printing.**—Every form of commercial paper implies a written instrument by its very definition. It must be *in writing*.¹ And it is conceived that this is universally true. It is the case in the civil law States and in Germany.² It is also implied, if not expressly required, by the use of such words as “writing,” “written,” &c., in the statutes of many, if not all, of the United States,³ and in the definitions contained in many foreign statutes.⁴

Writing does not, however, necessarily imply ink. It may

¹ Chitty 147; 1 Daniel 82; 1 Edwards § 168; Story on Bills § 33; Story on Prom. Notes § 9; Thomas v. Bishop, R. T. Hardw. 2; S. C., 2 Stra. 955.

² 1 Pardessus 344; Thöl's Wechselrecht 141.

³ *Arkansas* (1874 R. S. § 563); *California* (1872 Civ. Code § 8087); *Colorado* (1877 G. L. p. 110 § 90); *Dakota* (1877 R. C. § 1821); *Delaware* (1874 R. C. c. 63 § 8); *Georgia* (1873 Code § 2774); *Idaho* (1875 R. L. p. 652 § 1); *Illinois* (1880 R. S., Hurd's Ed., c. 98 § 3); *Indiana* (1 R. S. 1876, Davis' Ed., c. 177 § 1); *Iowa* (1880 R. C. § 2082); *Michigan* (1 Comp. L. 1871 p. 515 § 1); *Mississippi* (1880 R. C. § 1123); *Nevada* (1 Comp. L. 1873 c. 5 § 9); *New Jersey* (1874 Rev. p. 897 § 1); *New York* (2 R. S. Ed. 1875, p. 1160 § 1); *Pennsylvania* (1872 Purd. Dig. p. 1173 §§ 1, 2); *Wisconsin* (1878 R. S. § 1675).

⁴ Bills of Exchange Act 1882, 45 and 46 Vict. c. 61 § 3; *Belgium* (Code Napoleon A. D. 1807 § 110); *Bolivia* (Cod. Merc. 1834 § 349); *Chili* (Cod. Com. 1865 Art. 632); *France* (Code Napoleon, *supra*); *Holland* (Code Com. § 100); *Hungary* (Law of 1860, ch. 1 § 1); *Lower Canada* (Civil Code 1867 § 2279); *Italy* (Cod. Com. 1865 Art. 196).

be in *pencil*,¹ or any other material capable of making a legible writing. "Writing" must moreover be held to include *printing*,² at least as regards the body of the instrument, for which it is not unusual to employ a printed form. Printing in its turn of course includes lithography, engraving and every means by which letters are impressed in ink or color on the surface of paper or other like material.

§ 61. **Material.**—Bills, notes and other instruments of exchange, although often spoken of as commercial paper, and usually written or printed *on paper*, are not necessarily so.³ Unusual form and material are clearly to be avoided as sub-

¹ Byles 79; Chitty 147; 1 Daniel 83; 1 Edwards § 169; 1 Parsons 21; Story on Prom. Notes § 11. This was first held as to notes in 1826 in *Geary v. Physic*, 5 B. & C. 234; S. C., 7 Dow. & Ry. 653; all the judges concurring. It has been followed in *Closson v. Stearns*, 4 Vt. 11; *Brown v. Butcher's and Drovers' Bank*, 6 Hill 443; *Reed v. Roark*, 14 Tex. 329. See, too, Thöl W. R. 141, for recognition of the same principle in Germany. Mr. Parsons, however, speaks of the decision in *Geary v. Physic* as rendered "incautiously" (1 Parsons 22), and Mr. Justice Story regrets the establishment of the doctrine (*Story on Prom. Notes* § 11).

Writing in pencil has been held sufficient in case of a *deed* of settlement, *McDowel v. Chambers*, 1 Strobb. Eq. 347; a *contract*, *Merritt v. Clason*, 12 Johns. 102; S. C., 14 Ib. 484; *Jeffery v. Walton*, 1 Stark. 267; *Draper v. Patani*, 2 Speers 292 (under the statute of frauds); a *will*, *Green v. Skipworth*, 1 Phillim. 53; *Dickenson v. Dickenson*, 2 Phillim. 173; or a *codicil* to a will, *Rymes v. Clarkson*, 1 Phillim. 22.

² 1 Daniel 84; so Story on Prom. Notes § 11, and Thöl W. R. 141 (as to the body of the instrument, but *contra* as to the signature). And a memorandum printed on the margin of a note is part of it, *Zimmerman v. Rote*, 75 Penna. St. 188 (1874); or even on the back, *Farmers' Bank v. Ewing*, 78 Ky. 264 (1880). In *Pennington v. Baehr*, 48 Cal. 565 (1874), a printed fac-simile of an autograph was held to be a sufficient signature to a coupon. So, to a due bill, *Weston v. Myers*, 33 Ill. 424 (1864). In *Commonwealth v. Ray*, 3 Gray 447, an indictment for forgery of a printed railroad ticket was sustained on the ground that "printing" was included in the term "writing." And in Indiana writing is declared by statute to include "printing, lithographing, or other mode of representing words or letters," 2 R. S. Davis' Ed., p. 316 ch. 2 § 9. In Massachusetts by statute of 1804 (c. 58 § 1) all bills, notes, checks, drafts or obligations whatsoever under the amount of five dollars were required to be wholly in writing, and if made or issued after April 1st, 1805, bearing the impression of types, plates or printing, they were to be utterly void. This act was held to apply to notes issued after April 1st, 1805, but fraudulently ante-dated to evade the statute, even in the hands of *bona fide* holders, *Bayley v. Taber*, 5 Mass. 286 (1809).

³ Byles 78, 167; 1 Daniel 86; 1 Edwards § 169; 1 Parsons 23; Story on Prom. Notes § 11.

Metallic tokens have never been recognized at common law as more than simple evidence of debt, Byles 260. In England tokens made partly of gold or silver formerly made the issuer liable to the holder by 53 Geo. III. c. 114, repealed now by 24 and 25 Vict. c. 101; but if wholly or in part of copper, the issuer is liable only to the original taker by 57 Geo. III. c. 46.

jecting the instrument to suspicion and endangering the good faith of the holder's title. No question, however, has been raised in English or American courts as to notes on other material than paper or parchment, and the doubt, if there is one, can hardly be deemed of any practical importance.

§ 62. **Signature—Necessary.**—Signature is the writing of a person's name in order thereby to give effect to the contract signed. The signature of maker or drawer, therefore, as the case may be, is essential to the completeness and efficacy of a note, bill or other negotiable instrument.¹ And even where several have signed as sureties for a principal, the note has been held incomplete until signed by the principal also.² In like manner a note signed by A. and delivered to the payee's agent under an agreement that he was not to be holden unless another person "signed ahead of him," is not binding on A., in the hands of the payee at least, without the other person's signature.³ And without the signature of the drawer a bill payable "to my order," though accepted, was formerly held to be of no force either as a bill of exchange or as a promissory note.⁴ It has, however, been held in a recent case in the United States, that a promissory note signed by an in-

¹ Byles 89; Chitty 187; 1 Edwards § 143; Story on Prom. Notes § 34; 1 Daniel 83; Thöl's W. R. 148; Vyse v. Clarke, 5 Carr. & P. 403 (1832); Tevis v. Young, 1 Mete. 199 (Ky. 1858); May v. Miller, 27 Ala. 515 (1855). So, Bills of Exchange Act 1882, 45 and 46 Vict. c. 61 § 23. And the forgery of acceptance on an instrument in the form of a bill of exchange, with no drawer named and no drawer's signature, is not the forgery of a bill of exchange, Regina v. Harper, C. C. Reserved, 15 Am. L. Rev. 553 (1881).

² Knight v. Hurlbut, 74 Ill. 133 (1874). And he may set up such defense against one who held it until maturity for the payee and then had it indorsed for the purpose of bringing suit, Stricklin v. Cunningham, 58 Ill. 293 (1871).

³ Miller v. Gambie, 4 Barb. 148 (1848). But such defense is in general unavailable against a *bona fide* holder for value, Smith v. Moberly, 10 B. Mon. 266 (1850). See, also, the question of conditional delivery, discussed *infra*.

⁴ Byles 89; Stoessiger v. S. E. Ry. Co., 3 El. & Bl. 553 (1854); Goldsmid v. Hampton, 5 C. B. N. S. 108 (1858). See, also, McCall v. Taylor, 34 L. J. C. P. 365; S. C., 19 C. B. N. S. 301 (1865). The contrary is provided by statute in the Argentine Republic (Com. Code 1862 Art. 776 § 6); and in Uruguay (Com. Code 1865 Art. 789). And in Harvey v. Cane, 24 W. R. 400, 34 L. T. N. S. 64 (1876), the acceptor's signature of a bill leaving the drawer's name blank, was held to amount to an authority to a *bona fide* purchaser for value to write his own name as drawer.

dorser, and delivered with a blank for the maker's signature, authorized the holder to fill such blank like any other.¹

The statutes of some of the United States require that negotiable instruments shall be signed by the person to be holden thereby.² The statute of 3 and 4 Anne c. 9 applies only to "notes in writing signed by the party who makes the same." And in general the statutes of foreign States require the signature of the maker or drawer both to notes and bills of exchange.³

§ 63. **Signature—What Name.**—In general, however, unless otherwise provided by statute, the full name of the signer is not essential to a good signature. Thus, a signature by initials has been held sufficient.⁴ So, too, even an indorse-

¹Whitmore v. Nickerson, 125 Mass. 496 (1878). And this may, of course, be done by the payee as the maker's agent by express authority, *Haven v. Hobbs*, 1 Vt. 238 (1828).

²This is the case as to all negotiable instruments in *Indiana* (1 R. S. 1876, Davis' Ed., c. 177 § 1); and as to negotiable notes in *Iowa* (1880 R. C. § 2082); *Nebraska* (1861 P. L. p. 4; 1 Comp. L. 1873 c. 5 § 9); *New Jersey* (1795 Pat. Rev. p. 342 § 4); *New York* (1801, 1 R. L. 151; 2 R. S., Ed. 1875, p. 1160 § 1); and as to orders for the payment of money in *Tennessee* (1762 P. L. c. 9 § 4; 1871 C. S. § 1959). As to bank notes special provision is made by statute in many States for their signature by the president and cashier.

³This is the case in the *Argentine Republic* (Code of Commerce 1862 Art. 776 § 6); *Austria* (Austr. Exch. Law of 1850 Art. 4); *Bolivia* (Mercantile Code 1834 Art. 362 § 8, as to bills of exchange; and Art. 463 § 7, as to drafts); *Chili* (Code of Commerce 1855 Art. 633, as to bills of exchange; and Art. 771 § 7, as to drafts and notes); *Colombia* (Code of Commerce 1853 Arts. 384, 517); *Ecuador* (same as Spain by act of 1829); *Germany* (Gen. Germ. Exch. Law of 1848 Art. 4); *Guatemala* (as to notes, Ordinances of Bilbao of 1774 c. 14 § 1); *Holland* (Commercial Code of 1838 Arts. 100, 208, 210); *Honduras* (same as Guatemala); *Hungary* (Law of 1860 ch. 1 § 14); *Lower Canada* (Civil Code 1867 §§ 2280, 2346); *Mexico* (Code of Commerce of 1854 Art. 223, as to bills of exchange; Art. 447, as to drafts and notes); *Nicaragua* (Code of Commerce of 1869 Art. 241, as to bills of exchange; Art. 312, as to drafts and notes); *Paraguay* (same as Guatemala); *Peru* (Code of Commerce 1853 Arts. 381, 522); *Portugal* (Commercial Code 1833 Arts. 321, 424); *Russia* (Exch. Law of 1832 Art. 541); *Salvador* (Code of Commerce 1855 Arts. 381, 510); *Spain* (Code of Commerce 1829 Arts. 426, 563); *Sweden and Norway* (Exch. Law of 1851 ch. 1 § 1); *Switzerland* (Zurich 1805 §§ 1, 2; Basle 1863 § 3; Berne 1859 § 3); *Uruguay* (Code of Commerce 1865 Art. 789); *Venezuela* (Code of Commerce 1862 Art. 1). The Code Napoleon of 1807, which in this respect governs France, Belgium, Greece, Hayti, San Domingo, the Canton of Geneva and Turkey is silent as to the question of signature (Code Art. 110). It is maintained, however, by M. Bedarride that this is necessarily implied from the proof, which can only be made by proof of the signature (*Droit Commercial*, Bk. 1 Tit. 8 Art. 42).

⁴1 Daniel 84; 1 Edwards § 170; 1 Parsons 23; Thomson on Bills 40; Merchants' Bank v. Spicer, 6 Wend. 443 (1831); Palmer v. Stephens, 1 Den. 479 (1845); Weston v. Myers, 33 Ill. 424 (1864). But see Chalmers's Dig. Art. 49 *n*.

ment in figures "1, 2, 8," the intention of the indorser to bind himself as such being clearly shown.¹ So, too, a maker or indorser may be bound by the signature of an assumed or fictitious name; by a corporate, official, or partnership name; or even by the name of a factory or of a steamboat, the owners being held as makers. The reader is referred for the consideration of such signatures to a later chapter on maker's and drawer's names. It is, however, advisable in all possible cases that the signature should contain the entire surname and at least the initials of the Christian names. This, or more, is required by many foreign statutes.²

§ 64. **Seal—Mark—Stamp—Printing.**—And it seems that in the civil law a *seal* is no equivalent for a signature, whatever the signer's intention may be.³ Nor is a seal alone sufficient at common law,⁴ except perhaps in the case of a corporation note or bill.⁵ But where the person signing cannot write, his *mark* will be a sufficient signature.⁶ And this

where the former of these cases is cited with the comment that "in America the rule is lax." See, too, *Caton v. Caton*, L. R. 2 H. L. 143 (1867).

¹*Brown v. Butchers' and Drovers' Bank*, 6 Hill 443. But see *Chalmer's Dig. Art. 49 n.*, as to extending this rule to England.

²The maker's own name or the name of his house or of the person who signs for him under a sufficient power of attorney is requisite to a good signature in the *Argentine Republic* (Com. Code 1862 Arts. 776, 916).

The maker's name is required in *Austria* (Law of 1850 Arts. 4, 96); *Brazil* (Com. Code 1850 Arts. 354, 426); *Chili* (Com. Code 1865 Art. 771, as to notes and drafts); *Germany* (Gen. Exch. Law 1848 Arts. 4, 96); *Hungary* (Law of 1860 ch. 1 § 14, the last name in full and initials at least of first name); *Mexico* (Code Com. 1854 Arts. 323, 447); *Guatemala, Honduras and Paraguay* (Orde. Bilbao 1774 ch. 14 § 1, as to notes); *Lower Canada* (Civ. Code 1867 §§ 2280, 2344, "signature or name"); *Russia* (Law of 1832 Art. 541, "full name"); *Spain* (Code Com. 1829 Art. 426—so, too, *Colombia, Costa Rica, Ecuador*).

So, also, the indorser's name is required in *Brazil* (Com. Code 1850 Art. 362); *Colombia* (Com. Code 1853 Art. 424); *Costa Rica* (Code Com. 1853 Art. 414); *Ecuador* (see *Spain*); *Germany* (Gen. Exch. Law 1848 Art. 12); *Mexico* (Code Com. 1854 Art. 360); *Guatemala, Honduras and Paraguay* (Orde. Bilbao 1774 ch. 13 § 3); *Salvador* (Code Com. 1855 Art. 421); *Spain* (Code Com. 1829 Art. 467).

³*Heineccius de Camb. c. 4 § 18*; *Story on Prom. Notes § 35*.

⁴*Chalmer's Dig. Art. 49*.

⁵*Chalmer's Dig. Art. 278*; *Crouch v. Credit Foncier*, L. R. 8 Q. B. 382 (1873).

⁶*Byles 79*; 1 *Daniel 84*; 1 *Edwards §§ 146, 170*; 1 *Parsons 23*; *Story on Prom. Notes § 34*; *Chalmer's Dig. Art. 49*; *George v. Surrey*, 1 *Mood. & M. 516* (1830); *Willoughby v. Moulton*, 47 *N. H. 205* (1866); *Hilborn v. Alford*, 22 *Cal. 482* (1866); *Shank v. Butsch*, 28 *Ind. 19* (1867); *Shiver v. Johnson*, 2 *Brev. 397* (1810); *Handyside v. Cameron*, 21 *Ill. 588* (1859). But under the

is expressly provided by statute in some States;¹ and also by some foreign statutes.²

Printing a signature with a *hand stamp* is probably sufficient,³ although such act necessarily impairs the means of proof. And such signature for the Bank of England by a clerk has been specially legalized by statute.⁴ It is, however, more doubtful whether a signature *printed* in the ordinary manner, without any manual act of the maker, is sufficient.⁵

Revised Code of Alabama the mark must be accompanied by the signer's name written near it and attested by a witness, *Flowers v. Bitting*, 45 Ala. 448 (1871).

¹In *California*, "signature or subscription includes mark, when the person cannot write, his name being written near it and witnessed by a person who writes his own name as a witness" (1872 Polit. Code § 17; Civ. Code § 5014; Code Civ. Proc. § 10017; Penal Code § 13007).

In *Indiana*, "in all cases where the written signature of a person is requisite, either the proper handwriting of such person or his mark shall be intended" (2 R. S. 1876, Davis' Ed., p. 316 c. 2 § 9).

In *Tennessee* orders by any one for the payment of money must be "signed by his proper hand" (1871 C. S. § 1959; 1762 P. L. c. 9 § 4).

²A signature by mark is invalid unless attested by a court or notary, in *Germany* (Gen. Exch. Law 1848 Art. 94); *Austria* (Law of 1850 Art. 94); *Hungary* (Law of 1860 ch. 1 § 14; but since 1863 no person unable to write can make a bill of exchange, *Ib.*) The signature of the maker "with his own name" is required in the *Argentine Republic* (Com. Code 1862 Art. 776 § 6); *Uruguay* (Com. Code 1865 Art. 789). So, as to both drafts and notes in *Chili* (Com. Code 1865 Art. 771 § 7). In *Honduras, Guatemala and Paraguay* (Orde. Bilbao 1774 c. 13 § 2) both *name* and *residence* of drawer are requisite to a bill of exchange, and *full signature* of the maker to a promissory note (*Ib.* c. 14 § 1). In *Lower Canada* bills and notes must contain "the signature or name" of the drawer (Civ. Code 1867 §§ 2280, 2344). The signature of the maker or drawer is required to be written by his own hand in *Colombia* (Com. Code 1853 Art. 384, as to bills); *Costa Rica* (Cod. Com. 1853 Art. 373); *Ecuador* (same as Spain since 1829); *Mexico* (Cod. Com. 1854 Art. 223; and as to drafts and notes, subscription of maker's or drawer's *name* is requisite, *Ib.* Art. 447); *Peru* (Cod. Com. 1853 Art. 381 § 7); *Spain* (Cod. Com. 1829 Art. 426). In *Switzerland* (Zurich 1805 § 2; Berne 1859 § 3; Basle 1863 § 3, the signature must be by the maker's or drawer's own hand or by attorney). Indorsement must be in the indorser's own hand in *Brazil* (Com. Code 1850 Art. 362); and must contain his name and entire signature in *Honduras, Guatemala and Paraguay* (Orde. Bilbao 1774 c. 13 § 3).

³A person stamping his own name has been held to have sufficiently complied with a statute requiring a paper to be "signed," *Bennett v. Brumfitt*, L. R. 3 C. P. 28 (1867). The statute of Indiana seems to exclude signature by stamp, printing, &c., as it provides that "writing" shall include printing, &c., "but in all cases where the written signature of a person is requisite either the proper handwriting of such person or his mark shall be intended" (2 R. S. 1876, Davis' Ed. p. 316 § 9).

⁴Act 1 Geo. IV. c. 92 § 3.

⁵Signature of this sort has been held sufficient in England for a bill of parcels, *Saunderson v. Jackson*, 2 Bos. & P. 239 (1800); *Schneider v. Norris*, 2 M. & S. 286 (1814), Lord Ellenborough, C. J., saying of this case, "here there is a signing by the party to be charged by words recognizing the printed

Cases of this sort are not likely to occur. When they do, they will probably fall under the rule laid down as to other contracts in *Saunderson v. Jackson*, and be upheld if clearly proved to be the act of the maker.

§ 65. **Signature—Position.**—The signature of the maker or drawer is generally at the bottom of the instrument, in the lower right-hand corner. Its position, however, is immaterial, unless the statute provides to the contrary.¹ "It is a point settled," says Chancellor Kent, "that if the name of a party appears in the memorandum and is applicable to the whole substance of the writing and is put there by him or by his authority, it is immaterial in what part of the instrument the name appears, whether at the top, in the middle or at the bottom."² Thus, "I, A. B., promise," &c., is a sufficient signature, if so intended.³ So, too, above the printed name of the bank designated as the place for payment of the bill.⁴ But where one signs with a seal in the lower right-hand corner and the other without a seal in the left-hand corner, they are not *prima facie* joint makers.⁵

name as much as if he had subscribed his mark to it, and it is the same in substance as if he had written N. & Co. with his own hand." But its sufficiency for bills, notes and other instruments of a commercial character has been denied by many writers, *Story on Prom. Notes* § 11; 1 *Parsons* 21; 1 *Edwards* § 168; *Thöl W. R.* 141; and is not supported by direct authority in England or in this country, except in *Pennington v. Baehr*, 48 Cal. 565 (1874), where such signature of a coupon was held sufficient. See, too, the remark of Sir W. Page Wood, L. J., in *Ex parte Birmingham Banking Co.*, L. R. 3 Ch. App. 654 (1868), where, however, hand printing seems to be referred to. And see 1 *Daniel* 84; *Chitty* 187 *n.*; *Story on Bills* § 53.

¹ *Bytes* 89; *Chitty* 187; 1 *Daniel* 83; 1 *Edwards* § 143; *Story on Bills* § 53; *Thöl W. R.* 148; *Palmer v. Grant*, 4 Conn. 389 (1822); *Quin v. Sterne*, 26 Ga. 223 (1858); *Lincoln v. Hinzey*, 51 Ill. 435 (1869). So, in *Hunt v. Adams*, 5 Mass. 358 (1809), where beneath one maker's signature there was written "I acknowledge myself holden as surety," signed by B., who was thereupon held as a joint promisor with the first signer.

² *Clason v. Bailey*, 14 Johns. 484; *Saunderson v. Jackson*, 2 Bos. & P. 238; *Wellford v. Beazley*, 3 Atk. 503; *Knight v. Crockford*, 1 Esp. 90; *Ogilvie v. Foljambe*, 3 Mer. 53; *Chitty* 187.

³ *Bytes* 89; *Chitty* 187; 1 *Daniel* 83; 1 *Edwards* § 143; 1 *Parsons* 23; *Story on Bills* § 53; *Taylor v. Dobbins*, 1 Stra. 399 (1721). The same is true of a contract under the statute of frauds, *Knight v. Crockford*, 1 Esp. 90; *Ogilvie v. Foljambe*, 3 Mer. 53; and of a will, *Lemarque v. Stanley*, 3 Lev. 1, prior to the statute requiring *subscription*.

⁴ *Turnbull v. Thomas*, 1 Hughes 172 (1875).

⁵ *Steininger v. Hoch*, 39 Penna. St. 263 (1861).

§ 66. **Irregular Indorsements.**—The maker's or drawer's signature may even be placed on the back of the paper.¹ As the back is, however, the usual place of signature of an indorser or guarantor, a signature in that place by the maker is open to misunderstanding and is differently construed in different States. Thus, it has been held that such signature is *per se* no contract and depends wholly on the signer's intention.² And it has been held to be, at least *prima facie*, an indorsement, subject to be proved by parol a contract of suretyship.³ In other States an indorser before the delivery of the instrument to the payee has been held to be a joint maker,⁴ subject, however, to parol evidence of a different intention.⁵ In other States he has been held to be a maker notwithstanding the payee's knowledge that he intended to bind himself as a surety.⁶ Such signer has been also held

¹*Rodocanachi v. Buttrick*, 125 Mass. 134, where Lord, J., says: "It is immaterial upon what part of the paper a party places his name, if his purpose in placing it upon the paper is the execution of the contract." So, too, *National Pemberton Bank v. Lougee*, 108 Mass. 373. So, too, *Palmer v. Grant*, 4 Conn. 389, where the note read "We, A. and B., as principals, and C. and D. as sureties, promise," &c., and C. and D., though signing on the back, were held as joint makers. See, too, *Quin v. Sterne*, 26 Ga. 223; *Schmidt v. Schmaelter*, 45 Mo. 502; *National Pemberton Bank v. Lougee*, 108 Mass. 371 (1871).

²*Crozer v. Chambers*, Spenc. 256 (1844). The intention in such case may be proved by parol, *Watkins v. Kirkpatrick*, 2 Dutch. 84 (1856).

³*Sill v. Leslie*, 16 Ind. 236.

⁴*Semple v. Turner*, 65 Mo. 696; *Hardy v. White*, 60 Ga. 454; *Ackerman v. Westervelt*, 2 Dutch. 92 n. (1847); *Chaddock v. Van Ness*, 6 Vroom 517 (1871); *Lequeer v. Prosser*, 1 Hill 256; *Powell v. Thomas*, 7 Mo. 440; *Lewis v. Harvey*, 18 *Ib.* 74; *Baker v. Block*, 30 *Ib.* 225; *Schmidt v. Schmaelter*, 45 *Ib.* 502; *Cahn v. Dutton*, 60 *Ib.* 297; *Mathewson v. Sprague*, 1 R. I. 8; *Perkins v. Barstow*, 6 *Ib.* 505; *Manufacturers' Bank v. Follett*, 11 *Ib.* 92; *Carpenter v. McLaughlin*, 12 *Ib.* 270; *Samson v. Thornton*, 3 Metc. 275; *Riley v. Gerrish*, 9 Cush. 104; *Bryant v. Eastman*, 7 *Ib.* 111; *Wright v. Morse*, 9 Gray 337; *Essex Co. v. Edwards*, 12 *Ib.* 273; *Clapp v. Rice*, 13 *Ib.* 403; *Union Bank v. Willis*, 8 Metc. 504; *Barrows v. Lane*, 5 Vt. 161; *Knapp v. Parker*, 6 *Ib.* 642; *Flint v. Day*, 9 *Ib.* 345; *Strong v. Riker*, 16 *Ib.* 554. But see *Bigelow v. Colton*, 13 Gray 309; *National Pemberton Bank v. Lougee*, 108 Mass. 371 (1871). And in Massachusetts such signer is now by statute entitled like an indorser to notice of dishonor (1877 Supp. G. S. p. 307 c. 404—act of 1874).

⁵*Sandford v. Norton*, 14 Vt. 228; *Strong v. Riker*, 16 *Ib.* 554 (1844); *Barrows v. Lane*, 5 *Ib.* 161; *Knapp v. Parker*, 6 *Ib.* 642; *Flint v. Day*, 9 *Ib.* 345. But see, *contra*, *Union Bank v. Willis*, 8 Metc. 504 (1844); *Wright v. Morse*, 9 Gray 337 (1857).

⁶*Carpenter v. McLaughlin*, 12 R. I. 270 (1879).

to be a surety *prima facie*, subject to parol evidence of a contrary intention,¹ or a guarantor.²

For further illustration of the difficulties and ambiguities attending all signatures on the back of a negotiable instrument made for other purpose than transfer by indorsement, the reader is referred to a fuller discussion of the subject in a later part of this work. Sufficient has been said here to put the cautious upon their guard against all irregular signatures on the back of such instruments.

Sometimes, on the other hand, a signature which should be on the back appears by inadvertence on the face of the instrument below the name of the maker. This may occur in the case of an indorser³ or a guarantor⁴ without changing his intended contract.

In the absence, however, of statutory requirements the maker's signature need not be on the same paper that contains the instrument signed, but may be on another paper or "allonge" pinned or otherwise attached to it.⁵ But it must be either on the same paper or on such "allonge."⁶ Where "subscription" is required, as it is by many foreign statutes,⁷

¹Good v. Martin, 5 Otto 90 (1877). So, by statute in North Carolina, Batt. Rev. c. 10 § 10; Hoffman v. Moore, 82 N. C. 313 (1880). Joint principal or surety according to intention, Baker v. Robinson, 63 N. C. 191 (1869).

²Rivers v. Thomas, 1 B. J. Lea 649 (1878); Huntington v. Harvey, 4 Conn. 128 (1821). So of a non-negotiable note, Richards v. Warring, 1 Keyes 576 (1864), affirming 39 Barb. 42.

³Haines v. Dubois, 1 Vroom 259 (1863).

⁴Cason v. Wallace, 4 Bush 388 (1868).

⁵Heister v. Gilmore, 5 Phila. 62 (1862). So, too, in Sweden and Norway an indorsement by express statute (Cod. Com. 1851 c. 1 § 13); and in Switzerland (Berne 1859 § 11; Basle 1863 § 11); Germany (Exch. Law 1848 Art. 11); Austria (Exch. Law 1850 Art. 11). But in Paraguay, Honduras and Guatemala it must be on the back (Orde. Bilbao 1774 c. 13 § 3).

⁶French v. Turner, 15 Ind. 59.

⁷The maker's or drawer's name must be "subscribed" in Austria (Law of 1850 Art. 4; but in Germany and in Austria the word has been construed to have no relation to the place of signature, Thöl W. R. 148 n.); Bolivia (Com. Code 1834 Art. 362 § 8, as to bills; Art. 463, as to drafts); Chili (Com. Code 1865 Art. 633, as to bills; Art. 767, as to drafts and notes); Colombia (Com. Code 1853 Art. 384, as to bills; Art. 517, as to drafts and notes); Costa Rica (Code Com. 1853 Art. 373, as to bills; Art. 510, as to drafts and notes); Germany (Gen. Exch. Law 1848 Art. 4 § 5, Art. 96); Holland (Code Com. 1838 Arts. 100, 208, 210); Hungary (Law of 1860 c. 1 § 14); Ecuador (same as Spain); Mexico (Cod. Com. 1854 Art. 223, as to bills; Art. 447, as to drafts and notes); Nicaragua (Cod. Com. 1869 Art. 241, as to bills; Art. 261, as to indorsements; Art. 312, as to drafts); Peru (Com. Code 1853 Art. 381, as to

it is apparently necessary that the maker or drawer should place his signature on the paper containing the instrument and at the bottom of it.

§ 67. **Signature—Pleading—Evidence.**—In declaring upon a note or bill the “signing” of it need not be averred in precise words, but it is a sufficient averment that A. “made” his certain note, &c.¹ The execution must, however, be proved as a fact.² In general there is no subscribing witness to make such proof. If there be one, it may be otherwise proved in case of the witness’ absence, forgetfulness or incapacity.³ Moreover the act of signing need not be specifically proved, but delivery by the maker, and probably other actions of his, are sufficient evidence of his signature.⁴

So, too, the maker’s own admission is sufficient proof of his signature.⁵ But such admission must clearly identify the instrument. Thus an admission of “a note to A.” is not sufficient.⁶ Nor is the mere failure of the maker’s executor to deny the signature, on presentation of the note to him, equivalent to an admission.⁷ But in New Hampshire at least, by present rules of pleading, the want of an affidavit of denial is presumably an admission.⁸ An admission of his signature made by the maker to a *bona fide* purchaser before

bills; Art. 522, as to drafts and notes); *Portugal* (Cod. Com. 1833 Art. 321, defining a bill as “an instrument by which the *subscriber*,” &c.); *Russia* (Cod. Com. 1832 Art. 541); *Salvador* (Cod. Com. 1855 Art. 510); *Spain* (Code Com. 1829 Art. 426, as to bills; Art. 563, as to drafts and notes); *Sweden and Norway* (Cod. Com. 1851 c. 1 § 1); *Switzerland* (Zurich 1805 § 1; Berne 1859 § 3; Basle 1863 § 3); *Uruguay* (Cod. Com. 1865 Art. 789, as to drafts); *Venezuela* (Cod. Com. 1862 Art. 1, as to bills).

¹ *Elliot v. Cooper*, 2 Ld. Raym. 1376 (1725); *Smith v. Jarves*, *Ib.* 1484 (1727); *Erskine v. Murray*, *Ib.* 1542.

² *Colbath v. Jones*, 28 Mich. 280 (1873).

³ *Quimby v. Buzzell*, 16 Me. 470 (1840).

⁴ *Melvin v. Hodges*, 71 Ill. 422 (1874).

⁵ *Hilborn v. Alford*, 22 Cal. 482 (1866); *Nichols v. Allen*, 112 Mass. 23 (1873); *Willoughby v. Moulton*, 47 N. H. 205; *Hall v. Phelps*, 2 Johns. 451 (1807); *Mauri v. Heffernan*, 13 Johns. 57, 74 (1816); *Casco Bank v. Keene*, 53 Me. 103 (1865); *Fall River Nat. Bank v. Buffington*, 97 Mass. 498 (1867); *Hodges v. Eastman*, 12 Vt. 358 (1839). Although made to a third person, *Smith v. Witton*, 69 Mo. 458 (1879).

⁶ *Shaver v. Ehle*, 16 Johns. 201 (1819); *Palmer v. Manning*, 4 Den. 131 (1847). See, too, *Smith v. Witton*, 69 Mo. 458 (1879).

⁷ *Filley v. Angell*, 102 Mass. 67 (1869).

⁸ *Great Falls Bank v. Farmington*, 41 N. H. 32 (under Rules of 1860 No. 44).

delivery of the note, estops him from all subsequent denial.¹ And like effect has been given to an admission made to an indorsee even after delivery, but before maturity.²

Perhaps proof by means of witnesses acquainted with the maker's handwriting is the most usual and convenient method, if there is no evidence of the maker's actions or admissions.³ Evidence of the maker's handwriting may likewise be obtained from comparison of the signature to be established with other signatures already admitted or proved in the case to be genuine;⁴ but not by comparison with other disputed papers not in the case.⁵ In the absence of a subscribing witness, his handwriting may be proved as in other cases.⁶

§ 68. **Attestation—Statutes.**—Bills and notes do not require an attesting witness and it is not customary, nor in general desirable, to have them witnessed. Even if a note is signed by a mark a witness is unnecessary (however desirable it might then be), unless required by statute.⁷

In some of the States a distinction is made by statute between attested promissory notes and others, the former being excepted from the six-year limitation of actions and made actionable for a longer period.⁸ To bring a note within these statutes the witness must be a legally competent witness at the date of the attestation.⁹ And one who, on

¹*Caſco Bank v. Keene*, 53 Me. 103 (1865).

²*Fall River Nat. Bank v. Buffington*, 97 Mass. 498 (1867).

³*George v. Surrey*, 1 Mood. & M. 516 (1830); *Chaffee v. Taylor*, 3 Allen 598 (1862).

⁴*First Nat. Bank of Houghton v. Robert*, 41 Mich. 709 (1879); *Horner v. Wallis*, 11 Mass. 309 (1814); *Hardy v. Norton*, 66 Barb. 527 (1873); *contra*, *Hanley v. Gandy*, 38 Tex. 211 (1866).

⁵*Vinton v. Peck*, 14 Mich. 287 (1866).

⁶*Shiver v. Johnson*, 2 Brev. 397 (1810).

⁷*Shank v. Butsch*, 28 Ind. 19 (1867). The Alabama statute requires attestation in such case, *Flowers v. Bitting*, 45 Ala. 448 (1871); and attestation by two witnesses for a transfer of note by a married woman, *Walker v. Struve*, 70 *Ib.* 167 (1881); 1876 Code § 2707.

⁸*Maine*, R. S. 1883 c. 81 § 86; *Massachusetts*, 1882 Pub. Stats. c. 197 § 6; c. 133 § 5; *Vermont*, 1880 Rev. L. § 961. The Massachusetts acts only apply to suits by the payee or his personal representative, or a purchaser from such representative under order of the probate court.

⁹*Jenkins v. Dawes*, 115 Mass. 599 (1874).

receiving a note as the agent of the payee, signs it in the usual place for attestation without request or explanation, has been held not to be an attesting witness.¹ Neither is an acknowledgment of a note indorsed on it and witnessed within the statute;² nor a surety's undertaking written after and without knowledge of the attestation of the maker's signature.³ So, one of several joint makers whose signature had not been really seen or attested by the witness may avail himself of the statute of limitations even against a *bona fide* holder, who supposed all the signatures were attested.⁴

If a note is attested and therefore within the exception of the statute of limitations it has been held that this should be specially pleaded.⁵ But it need not appear that the attestation was in any particular position on the paper. Thus, a renewal indorsed and attested on the back of a note is within the statutory exception.⁶ And the signature of a witness written above the date instead of at the foot of a note may be shown to have been intended for an attestation of the note.⁷ But it has been questioned whether an attestation on the face of a bill is sufficient for a signature on the back.⁸ And it has been held that the sufficiency of an attestation written four years after the note was signed, at the maker's request and on his acknowledgment of his signature, is a question for the jury to determine.⁹

In England the statute until 1863 required bills, notes and drafts, other than checks on bankers, and the indorsement of them to be attested, if drawn for less than five pounds and more than one pound.¹⁰

¹ Farnsworth v. Rowe, 33 Me. 263 (1851).

² Gray v. Bowden, 23 Pick. 282 (1839).

³ Walker v. Warfield, 6 Metc. 466 (1843).

⁴ Trustees of Solon v. Rowell, 49 Me. 330 (1860).

⁵ Carpenter v. McClure, 38 Vt. 375 (1866).

⁶ Daggett v. Daggett, 124 Mass. 149 (1878).

⁷ Warren v. Chapman, 115 Mass. 584 (1874).

⁸ Black v. Rogers, 68 Me. 574 (1878).

⁹ Swazey v. Allen, 115 Mass. 594 (1874).

¹⁰ 17 Geo. III. c. 30 temporarily repealed in 1863 by 26 and 27 Vict. c. 105, 41 and 42 Vict. c. 70. Repealer continued from year to year to present time.

§ 69. **Proof by Attesting Witness.**—If there is an attesting witness, he must, in general, be called to prove the instrument;¹ especially in the case of a sealed note.² This is, of course, dispensed with if the witness is dead,³ or has become insane,⁴ or cannot be found in the State.⁵ In all such cases the handwriting of the witness may be proved. So, too, if the witness cannot tell whether he signed as witness or not;⁶ or if he did not see the maker sign;⁷ or only saw one of several makers sign the paper.⁸ Or if the maker has admitted his signature this may be proved and the subscribing witness not called.⁹

¹ *Stone v. Metcalf*, 1 Stark. 53. But now such witness need only be called in England where the attestation is necessary to the validity of the instrument, 17 and 18 Vict. c. 125 § 26.

² *January v. Goodman*, 1 Dall. 208.

³ *Wilson v. Whittall*, 1 B. & Ald. 22 n.

⁴ *Carrie v. Child*, 3 Campb. 283.

⁵ *Shiver v. Johnson*, 2 Brev. 397; *Dunbar v. Warden*, 13 N. H. 311 (1842). And this is true, although the note be signed by the maker's mark, *Bussey v. Whitaker*, 2 Nott. & McC. 374; *Shiver v. Johnson*, *supra*.

⁶ *Quimby v. Buzzell*, 16 Me. 470 (1840).

⁷ *Lemon v. Dean*, 2 Campb. 636 n.

⁸ *Tuten v. Stone*, 12 Rich. 448 (1860).

⁹ *Hall v. Phelps*, 2 Johns. 451; *Williams v. Floyd*, 11 Penna. St. 499 (1849). But see *contra* in the case of a sealed note, *Fox v. Reil*, 3 Johns. 451. Nor will the admission by the maker that he had given a note to the payee, the note in suit not having been produced and being in fact forged, render it unnecessary to call the subscribing witness, *Shaver v. Ehle*, 16 Johns. 291.

II. SEALED INSTRUMENTS.

70. Sealed Instruments not Negotiable.

71. Civil Law—Statutes.

72. What is a Seal—Scrolls—Stamps.

73. Evidence—Presumptions.

74. Corporation Seals—Coupon Bonds.

§ 70. **Sealed Instruments not Negotiable.**—The Statute of Queen Anne, to which promissory notes owe their negotiability, did not extend to instruments under seal. Sealed notes, therefore, as well as sealed bills and corporation and other bonds, were formerly held to be non-negotiable.¹ And this rule has been generally recognized in the United States, except where it is changed by statute.² An indorsement or guaranty under seal will not, however, affect the negotiable character of a bill or note not under seal.³ The addition of a seal is at common law a material alteration, as it affects among other things the statutory limitation;⁴ but if added by consent, after the paper has been barred by the statute as a simple contract, the statute will be extended to the limit fixed for specialties.⁵

¹ Byles 5; Chitty 190; 1 Edwards § 296; 1 Daniel 37; 1 Parsons 26; Story on Bills § 62; Story on Prom. Notes § 55; Glyn v. Baker, 13 East 509. But see Buller v. Crips, 6 Mod. 29.

² Brown v. Lockhart, 1 Mo. 289 (1823); Conine v. Junction, &c., R. R., 3 Houst. 288 (1866); Clark v. Farmer's Mfg. Co., 15 Wend. 256 (1836); Foster v. Floyd, 4 McCord 159 (1827); Frevall v. Fitch, 5 Whart. 325 (1840); Hall v. Hickman, 2 Del. Ch. 318 (1864); Helfer v. Alden, 3 Minn. 332 (1859); Brown v. Jordhal, 19 Cent. L. J. 38 (Minn. 1884); Merritt v. Cole, 9 Hun 98; S. C., 14 *Ib.* 324 (1878); January v. Goodman, 1 Dall. 208 (1787); Parker v. Kennedy, 1 Bay 398 (1794); Sayre v. Lucas, 2 Stew. 259 (Ala. 1830); Sidle v. Anderson, 45 Penna. St. 464 (1863); Tucker v. English, 2 Speers 673 (1844); Rawson v. Davidson, 49 Mich. 607 (1883); Barden v. Southerland, 70 N. C. 528 (1874); Murrell v. Jones, 40 Miss. 565 (1866); Lewis v. Wilson, 5 Blackf. 369 (1840); Osborn v. Kistler, 35 Ohio St. 99 (1878). And it has been held that the indorsee of such a note cannot sue on it although the seal is not referred to in the note, Conine v. Junction, &c., R. R., *supra*. But a note under a corporation seal was held to be negotiable in South Carolina in 1873, Central Nat. Bank v. R. R. Co., 5 So. Car. 156. As to corporation bonds, negotiable in form, see *infra*.

³ Ege v. Kyle, 2 Watts 222 (1834); Rand v. Dovey, 83 Penna. St. 280 (1876), this indorsement being under a corporate seal.

⁴ Davidson v. Cooper, 11 M. & W. 778, affirmed 13 *Ib.* 343; Vaughan v. Fowler, 14 So. Car. 355 (1880). So, too, United States v. Linn, 1 How. 104 (1843), if properly pleaded. But see, *contra*, Fullerton v. Sturges, 4 Onio St. 529 (1855).

⁵ Hanger v. Dodge, 24 Ark. 205 (1866).

Without being fully "negotiable" sealed bills have been held to be transferable by delivery, if payable to bearer.¹ But the transfer, whether by delivery, indorsement, or other form of assignment, is subject to existing equities.² And the assignor or indorser is not liable to his assignee or a subsequent holder without an express contract to that effect.³

Neither is a sealed note entitled to grace like one that is without seal.⁴ And it does not fall within the statutes authorizing joinder in one suit of the maker and indorser of commercial paper;⁵ nor within the act of congress of 1875 regulating the jurisdiction of the Federal Courts over "promissory notes negotiable by the law merchant."⁶ In the case of a sealed note a blank indorsement can be explained by parol evidence, unlike the indorsement of a negotiable note

¹ *Merritt v. Cole*, 9 Hun 98; S. C., 14 *Ib.* 324; *Porter v. McCollum*, 15 Ga. 528 (1854). But in Alabama by statute indorsement is necessary to a transfer, *Sayre v. Lucas*, 2 Stew. 259 (Ala. 1830). And so in Ohio, *Avery v. Latimer*, 14 Ohio 542, by an early statute, *Swan St.* 587 (1846). But to the effect that a bond cannot be made payable to bearer, see *Clarke v. City of Janesville*, 1 Biss. C. C. 98 (1856); *Marsh v. Brooks*, 11 Ired. 409 (1850). The contrary is now well established, however, *McCoy v. Washington Co.*, 3 Wall. Jr. 381.

² *Hall v. Hickman*, 2 Del. Ch. 318 (1864); *Hill v. Caillovel*, 1 Ves. Sr. 122 (1748); *Matthews v. Walwyn*, 4 Ves. 118 (1798); *Coles v. Jones*, 2 Vern. 692 (1715); *Turton v. Benson*, *Ib.* 765 (1718); *Clute v. Robison*, 2 Johns. 595, 612, (1807); *Barrow v. Bispham*, 6 Halst. 116 (1829); *Shannon v. Marselis*, Saxt. 424 (1831); *Wheeler v. Hughes*, 1 Dall. 23 (1776); *Hopkins v. R. R. Co.*, 3 Watts & S. 410 (1842). But, *contra*, as to his immediate indorsee, *Helfer v. Alden*, 3 Minn. 332 (1859).

³ *Frevall v. Fitch*, 5 Whart. 325 (1840); *Helfer v. Alden*, 3 Minn. 332 (1859); *Parker v. Kennedy*, 1 Bay 398 (1794); *Pratt v. Thomas*, 2 Hill 654 (S. C. 1835); *Tucker v. English*, 2 Speers 673 (1844); *Dilts v. Trimmer*, Penn. 951 (1812 N. J.); *Garrettsie v. Van Ness*, *Ib.* 20 (1806); *Boylan v. Dickerson*, *Ib.* 430 (1808); *Parks v. Duke*, 2 McCord 380 (1823).

By statute, however, the assignor is liable in case of due diligence on the part of the assignee in *Colorado* (1877 G. L. 111 § 94); *District of Columbia* (Md. Laws 1763 c. 23 § 9); *Idaho* (1875 R. L. 648 § 4); *Illinois* (1880 R. S. c. 98 § 7); *Indiana* (1876 R. S. c. 177 § 4); *Iowa* (1880 R. C. § 2088); *Maryland* (1763 P. L. c. 23 § 9; 1878 R. C. 595 § 48); *Mississippi* (1871 R. C. § 2228); *Nebraska* (1873 G. S. c. 32 § 2); *Ohio* (1830 P. L. 217 § 2; 1880 R. S. § 3172); *Virginia* (1873 Code c. 141 § 18); and *West Virginia* (1879 R. S. c. 12 § 15).

⁴ *Skidmore v. Little*, 4 Tex. 301 (1849).

⁵ *Mann v. Sutton*, 4 Rand. 253 (1826).

⁶ *Coe v. Cayuga Lake R. R.*, 8 Fed. Rep. 534, Blatchford, J., saying: "The instrument without the corporate seal will be a promissory note negotiable by the law merchant, and the instrument with the corporate seal will be a specialty and not a promissory note negotiable by the law merchant. If the capacity to make the instrument without as well as with the seal exists, it cannot, when made with the seal, be a promissory note negotiable by the law merchant."

not under seal.¹ But in New Jersey it has been held, that a sealed bill cannot be transferred at all by a blank indorsement.² And the drawer of a sealed bill is not entitled to be discharged by the holder's want of due diligence.³

§ 71. **Civil Law—Statutes.**—A seal is neither expressly required nor prohibited by statute in any European or American State.⁴ The civil law makes no distinction between sealed and unsealed bills;⁵ nor is such distinction made by the statutes of any foreign State. In some of the United States the distinction is done away by statute.⁶ In these States the affixing of a seal at the time of executing a note or bill may be regarded as mere surplusage. And the sealed bill, if in other respects negotiable, is governed by the rules of commercial paper.⁷ By statute sealed bills and bonds are made negotiable in many States.⁸ In other States

¹ *Gist v. Drakely*, 3 Gill 330 (1844).

² *Speer v. Post*, Penn. 1032 (1813).

³ *Force v. Craig*, 2 Halst. 330 (1823).

⁴ But in *Mississippi* the statute formerly restricted the character and effect of promissory notes to promises in writing "not under seal" (1871 Rev. Code c. 47 § 2227). This was omitted in the Revised Code of 1880. Sealed notes, however, are assignable subject to equities, *Ib.* § 2228; *Murrell v. Jones*, 40 Miss. 565; *Lamkin v. Nye*, 43 *Ib.* 241; *Smith v. Clopton*, 48 *Ib.* 66.

⁵ Story on Prom. Notes § 55.

⁶ Private seals are abolished in *Kansas* (1879 Comp. L. c. 21 § 6), corporate seals excepted; *Nebraska* (1873 Gen. Stats. c. 71 § 1); and *Tennessee* (1871 Comp. Stats. § 1804). Also in *Arkansas* by the constitution of 1868 (Art. XV. § 16). As to the effect of this provision on the statute of limitations, see *Dyer v. Gill*, 32 Ark. 410. All distinction between sealed and unsealed instruments is done away in *California* (Civ. Code 1872 § 6629; Code Civ. Proc. 1872 § 11932); *Indiana* (2 Rev. Stats., Davis' Ed., 1876 p. 146 § 273); *Kentucky* (1877 Gen. Stats. c. 22 § 2; 1812 1 Stat. L. 343; *Norton v. Allen*, 3 A. K. Marsh. 284 (1821); *Maxwell v. Gundrum*, 10 B. Mon. 286 (1850); *Michigan* (C. L. §§ 5367, 5384; *McKinney v. Miller*, 19 Mich. 142, 151 (1869)); *Mississippi*, so far as to give sealed bills a commercial character (*Murrell v. Jones*, *supra*, and other notes to this section); *New York* (1875 1 R. S. 768 § 1; 2 *Ib.* 406 § 77; *Anthony v. Harrison*, 14 Hun 198, affirmed 74 N. Y. 613); *Ohio* (Swan. Stats. 587; 1830 P. L. 217 § 1; 1880 R. S. §§ 3171, 3172; *Bain v. Wilson*, 10 Ohio St. 14 (1859); *Bank of St. Clairsville v. Smith*, 5 Ohio 222 (1831)); and *Texas* (1858 Pasch. Dig. Art. 5087; *Courand v. Vollmer*, 31 Tex. 397 (1868)).

⁷ *Bank of St. Clairsville v. Smith*, 5 Ohio 222 (1831).

⁸ This is the case in *California* (1872 Civ. Code §§ 8095, 8096; and see note 6 *supra*); *Colorado* (1877 Gen. L. 110 § 91); *Dakota* (1877 Rev. Code § 1829); *Illinois* (1880 Rev. Stats., Hurd's Ed., c. 98 §§ 3, 4; 1845 Rev. Stats. 384 §§ 3, 4); *Kansas* (1879 Comp. L. c. 14 § 1); *Massachusetts* (1859 G. S. c. 53 § 6); *Missouri* (1 R. S. 1879 c. 10 § 547); *Nebraska* (1873 G. S. c. 32 § 1), if payable to "order" or "bearer"; *Nevada* (1873 C. L. c. 5 § 9), as to "all notes in

such instruments are made assignable at law, subject however to equities existing against the assignor.¹ And in some

writing." In *New York* (2 Rev. S., 6th Ed., 1875 p. 1160 § 1), "all notes in writing" are made negotiable. In *Ohio* bonds are made negotiable, if payable to "order" or "bearer" (1830 P. L. 217 §§ 1, 2; 1880 R. S. §§ 3171, 3172), but by indorsement only, *Osborn v. Kistler*, 35 Ohio St. 99 (1878); *Cushman v. Welsh*, 19 *Ib.* 536 (1869); *Avery v. Latimer*, 14 Ohio 542 (1846).

In *Delaware* specialties "payable to any person or order or assigns" are made assignable, if attested by two witnesses, and the assignee may bring suit in his own name (Rev. Code 1852, amended 1874, c. 63 § 8). But the indorsement of a sealed instrument gives the indorsee no right to sue, *Conine v. Junction, &c.*, R. R., 3 Houst. 288 (1866).

In the *District of Columbia* instruments under seal are assignable, so that the assignee may sue in his own name, and the assignor is liable thereon as a surety (Md. Stat. 1763 c. 23 § 9).

In *Georgia* "all bonds, specialties or other contracts in writing for the payment of money or any articles of property are negotiable by indorsement or written assignment in the same manner as bills of exchange and promissory notes" (Code 1873 § 2776).

In *Maryland* sealed instruments for the payment of money are assignable, subject to defense, the assignor being only liable in case of due diligence on the part of the assignee (1878 Rev. Code 594 §§ 41-48; 1763 P. L. c. 23 § 9).

In *Massachusetts* it is enacted that "bonds and other obligations for the payment of money purporting to be payable to the bearer or some person designated or bearer, or payable to order issued by any corporation or joint stock company, shall be negotiable in the same manner and to the same extent as promissory notes" (1859 G. S. c. 53 § 6).

In *Mississippi* it was formerly provided that notes should be "not under seal" (1871 Rev. Code § 2227). This has been omitted, however, in the corresponding section of the statute now in force (1880 Rev. Code c. 40 § 1123).

In *Nebraska* bonds are made negotiable in like manner with promissory notes and bills of exchange, foreign or inland, and subject to like requirements (1873 G. L. c. 32 § 1; 1866 R. S. c. 27).

As to municipal bonds there is in *New York* by act of 1870 (2 R. S., Ed. 1875 p. 406 § 13) provision for a special indorsement to put an end to their negotiable character.

In *North Carolina* negotiable instruments may be with or without seal (1873 Bat. Rev. c. 10 § 1); *Pate v. Brown*, 85 N. C. 166 (1881).

In *Ohio* bonds are negotiable like promissory notes and bills, inland and foreign (1880 R. S. § 3171; 1830 P. L. p. 217 § 1).

In *Pennsylvania* bonds, specialties and notes were made assignable subject to equities by the act of 1715 (1 Sm. 90; 1872 *Purd. Dig.* p. 161 § 1).

In *Tennessee* bills, bonds and notes for money only are made negotiable, whether sealed or not (1786 P. L. c. 4 § 1; 1871 C. L. § 1957).

¹This is the case in *Alabama* (1876 Code § 2100); *Arkansas* (1874 Rev. Stats. §§ 563, 565); *Delaware* (1852 Rev. Code, Ed. 1874, c. 63 § 8); *District of Columbia* (*Dig. L.* 1863; *Laws Md.* 1763 c. 23 § 9); *Florida* (1870 Code Civ. Proc. Part II. Tit. III. §§ 62, 63); *Georgia* (1873 Code § 2244; but see § 2776); *Indiana* (1876 R. S., Davis' Ed., vol. 2 p. 135 § 6; c. 177 § 3), applicable to all bills and notes; *Iowa* (1880 Rev. Code §§ 2084, 2546); *Kansas* (1879 Comp. L. c. 80 § 27), as to non-negotiable instruments; *Kentucky* (1877 Gen. Stats. c. 22 § 6); *Maryland* (1878 Rev. Code 594 § 43); *Michigan* (1871 Comp. L. 1675 § 5), as to non-negotiable bonds and notes; *Minnesota* (1878 G. S. c. 66 § 27); *Mississippi* (1871 Rev. Code § 2228); see also, note 4, p. 75; *New Jersey* (1797 Pat. Rev. 254; 1863 P. L. 267; 1874 Rev. S. 850); *New York* (2 Rev. S., 6th Ed. 1875, 480 § 112), excepting the *bona fide* holder of negotiable bills and notes. *North Carolina* (1873 Bat. Rev. c. 10 § 1) makes such instruments subject to assignment and suit like inland bills of exchange, but this does

States the assignor or indorser is made liable without express stipulation to that effect.¹

§ 72. What is a Seal—Scrolls—Stamps.—What constitutes a seal has often been the subject of discussion. Sir Edward Coke's definition, "*Sigillum est cera impressa, quia cera sine impressione non est sigillum*,"² can no longer be regarded as the rule upon this subject. In many of the United States a scroll is by statute made a sufficient seal.³

not include a sealed note in which payee and amount are blank, *Barden v. Southerland*, 70 N. C. 528. *Pennsylvania* (Act of 1715, *Purd. Dig.* 1872 p. 161 § 1) makes specialties only assignable subject to equities. So, too, *South Carolina* (1873 R. S. 594 §§ 134, 135); *Texas* (1873 *Pasch. Dig. Art.* 222); *Virginia* (1 *Rev. Code* 484 c. 126 § 5; 1873 *Code* c. 141 § 17); *West Virginia* (1879 R. S. c. 12 § 14); and *Wisconsin* (1878 R. S. §§ 2605, 2606). In general these statutes only apply to bonds or other contracts for the payment of money only.

Such assignment may be by indorsement in *Alabama* (1812 P. L. 69; *Sayre v. Lucas*, 2 *Stew.* 259 (Ala. 1830)); *California* (1872 *Civ. Code* § 6459); *Colorado* (1877 G. L. 110 § 91); *Delaware* (1874 *Rev. Code* c. 63 § 8); *Georgia* (1873 *Code* § 2776); *Idaho* (1875 R. L. 648 § 2); *Illinois* (1845 R. S. 384 § 4; 1880 R. S., *Hurd's Ed.*, c. 98 § 4); *Indiana* (1876 R. S., *Davis' Ed.*, c. 177 § 1); *Iowa* (1880 R. C. §§ 2082, 2084); *Kansas* (1879 C. L. c. 14 § 1); *Mississippi* (1871 R. C. § 2228); *Nebraska* (1873 G. S. c. 32 § 1); *Ohio* (1830 P. L. 217 § 1; 1880 R. S. §§ 3171, 3172; *Swan Stats.* 587; *Avery v. Latimer*, 14 *Ohio* 542 (1846)); *Tennessee* (1786 P. L. c. 4 § 1; 1871 C. S. § 1957). In *West Virginia* a sealed bill is a specialty and not a note, *Laidley v. Bright*, 17 *W. Va.* 779 (1881).

¹This is the case in *Colorado* (1877 G. L. 111 § 94) on condition of the assignee using due diligence to collect from the maker; *District of Columbia* (*Dig. L.* 1863; *Laws Md.* 1763 c. 23 § 9), the assignor becoming liable as a surety; *Idaho* (1875 *Rev. L.* 648 § 4), like *Colorado*, *supra*. So, in *Illinois* (1845 R. S. 384 §§ 3, 4; 1880 R. S., *Hurd's Ed.*, c. 98 §§ 3, 4). So, in *Indiana* (2 *Rev. St.*, *Davis' Ed.*, 1876 c. 177 § 4); *Iowa* (1880 *Rev. Code* §§ 2584, 2088); *Maryland* (1878 *Rev. Code* 595 § 48); *Mississippi* (1871 *Rev. Code* c. 47 § 2228); *Missouri* (1 *Rev. S.* 1879 c. 19 § 665); *Nebraska* (1873 G. S. c. 32 § 2); *Virginia* (1873 *Code* c. 141 § 18); and *West Virginia* (1879 R. S. c. 12 § 15).

²3 *Coke Inst.* 169.

³In *California* a "scroll of a pen or the writing of the word 'seal' against the signature of the maker" (*Code Civ. Proc.* 1872 § 11931). In *Connecticut* the word "seal" or the letters [L. S.] (*Gen. Stats. Rev.* 438 § 17). And a scroll is sufficient in *Illinois* (1845 R. S. 421 § 56; 1880, *Hurd's Ed.*, R. S. c. 29 § 1); *Minnesota* (1878 *Gen. Stats.* c. 40 § 31); *Mississippi* (1871 *Rev. Code* c. 47 § 2227). "Whenever it is manifest that a scroll is intended to be used by way of seal it must have that effect, whether it so appears from the body of the instrument or from the scroll itself," *Thacher, J.*, in *Whittington v. Clarke*, 8 *Sm. & M.* 480; *McRaven v. McGuire*, 9 *Ib.* 34. But such intention must be manifest, *Hudson v. Poindexter*, 42 *Miss.* 306. A scroll is a seal in *New Jersey* by act of 1797 (*Pat. Rev.* 254; 1874 *Rev.* 741 § 1). So, in *Ohio* (1880 *Rev. Stats.* § 4) "any character or mark intended for a seal"; *Oregon* (1872 *Deady Gen. L.* 258 § 742); *Tennessee* by act of 1801, *Scruggs v. Brackin*, 4 *Yerg.* 528 A. D. 1833; *Virginia* (1 *Rev. Code* 510 § 94; 1873 *Code* c. 140 § 2); *West Virginia* (1878 R. S. c. 114 § 15); and *Wisconsin* (1878 *Rev. Stats.* § 2215; *Williams v. Starr*, 5 *Wis.* 549 (1856); and *Missouri* (1 *R. S.* 1879 c. 19 § 662) if "expressed on the face thereof to be sealed" and scroll

In others an instrument is sealed if it is declared in its body to be so.¹ But the recital of an unsealed note in a mortgage under seal securing it does not make it a specialty.² In the absence of statute to that effect a *scroll* is not a sufficient seal,³ although referred to as a seal in the body of the note or other instrument.⁴ Nor is a printed impression of a corporate seal sufficient.⁵ But an impression stamped into the

affixed "by way of seal"; and in *Michigan* "any device affixed by way of a seal" since 1827 (Comp. L. 1871 p. 1708 § 80). See, too, *Anderson v. Wilburn*, 8 Ark. 155, although the scroll lacked the usual "L. S."; *Hastings v. Vaughn*, 5 Cal. 315 A. D. 1855; *Commercial Bank v. Ullman*, 10 Sm. & M. 411; *Underwood v. Dollins*, 47 Mo. 259; *Long v. Ramsay*, 1 Serg. & R. 72 (1814); *Meredith v. Hinsdale*, 2 Cal. 362, as to Pennsylvania law. In *Minnesota* a scroll is a seal, although not referred to in the instrument, *Brown v. Jordhall*, 19 Cent. L. J. 38 (1884).

¹*Carter v. Penn*, 4 Ala. 140. And previous to the act of 1839 both seal (or scroll) and recognition of it in the instrument were required in *Alabama*. By that act (Code 1876 § 2194) "all writings which import on their face to be under seal" are sealed instruments. So, in *Connecticut* as to writings executed "by any person or corporation not having an official or corporate seal, purporting and intending to be a specialty or under seal and not otherwise sealed than by the addition of the word *seal* or the letters [L. S.]" (1875 Gen. Stats. Rev. 438 § 17); *Fish v. Brown*, 17 Conn. 340, referring to acts of 1824, 1836 and 1838, which had all been retrospective only. In *Georgia* the expression of intention to seal is sufficient by act of 1838. *Milledge v. Gardner*, 29 Ga. 700, and "no instrument shall be considered as under seal unless so recited in the body of the instrument" (Code 1873 § 2915); *Chambers v. Kingsbury*, 63 Ga. 828 (1882). And in *Missouri* such recital is necessary to the sufficiency of a scroll (1 Rev. St. 1879 c. 19 § 662). And in *Mississippi* the conclusion of a note with the words "witness my hand and seal" is enough without a seal to make it a specialty, so far as the statute of limitations is concerned, *McCarley v. Supervisors*, 58 Miss. 483 (1880).

²*Clark v. Tiger*, 2 Stark. 234; *Jackson v. Sackett*, 7 Wend. 102 (1831).

³*Blackwell v. Hamilton*, 47 Ala. 470 (1872); *Clegg v. Lemessurier*, 15 Gratt 108 (1859); *Andrews v. Herriot*, 4 Cow. 508 (1825) (overruling *Meredith v. Hinsdale*, 2 Cal. 362, on question of applicability of Pennsylvania law to New York action); *Warren v. Lynch*, 5 Johns. 239 (1810); *Bank of Rochester v. Gray*, 2 Hill 227 (1842); *Coit v. Milliken*, 1 Denio 376 (1845); *Douglas v. Oldham*, 6 N. H. 150; *Beardsley v. Knight*, 4 Vt. 479; *Deming v. Bullitt*, 1 Blackf. 241. But see, *contra*, *Jones v. Logwood*, 1 Wash. (Va.) 42 where a scroll was held to be a sufficient seal independently of the act of 1788. See, however, for later Virginia cases on this subject, § 73 note *infra*. See also, *Commonwealth v. Griffith*, 2 Pick. 18 n.; *Bradford v. Randall*, 5 Ib 497; *Tasker v. Bartlett*, 5 Cush. 364.

⁴*Irwin v. Brown*, 2 Cranch C. C. 314 (Va. case) (1822); especially where there is only a "flourish" opposite the name, of which it can be said by the court, "judging by inspection I see nothing like a seal," *Tilghman, C. J.*, in *Taylor v. Glaser*, 2 Serg. & R. 502.

⁵*Bates v. Boston and N. Y. C. R. R.*, 10 Allen 251 (1865); *Farmers' and Mfrs.' Bank v. Haight*, 3 Hill 493 (1842). So, of a notary's seal, *Bank of Rochester v. Gray*, 2 Hill 227. See also, *Jackson v. Myers*, 43 Md 452 (1875); *Muth v. Dolfield*, *Ib.* 466. But a corporate seal printed on a bond, which recites that it is sealed, has been held to be a sufficient seal, *Royal Bank v. Grand Junction R. R.*, 100 Mass. 444; *Woodman v. York* and

paper has been held to be a good corporate seal.¹ So, too, a paper stuck on with mucilage and stamped with a seal.²

§ 73. **Evidence—Presumptions.**—In the absence of statutory requirements to that effect, express recognition of the seal in the instrument, *e. g.* “witness my hand and seal,” is not necessary.³ In States, however, where a scroll is sufficient seal, such recognition is *prima facie* evidence of the obligor’s intention and dispenses with other proof of an intention to

Cumb. R. R., 50 Me. 549. An impression upon the paper or other material on which the instrument is written is sufficient seal by statute in *California* (Civ. Code 1872 § 6628; Code Civ. Proc. 1872 § 11931). So, of a court seal in *Colorado* (Code Civ. Proc. 1877 §§ 385, 408). So, of corporate and official seals in *Connecticut* (1875 Gen. Stats. Rev. 438 § 17). So, of public official and court seals in *Iowa* (1880 Rev. Code p. 11 § 14); and in *Maine* (1871 Rev. Stats. p. 58 § 15); and in *Massachusetts*, as also of corporate seals (1859 Gen. Stats. c. 3 § 7); and in *Michigan*, of all seals (see note 2 p. 77); and in *Minnesota*, of public seals (1878 Gen. Stats. c. 4 § 1); and in *Mississippi*, “any printed impression intended as a seal” (1871 Rev. Code c. 47 § 1). In *Nevada* a public seal may be affixed “by impressing it on the paper or on a substance attached to the paper and capable of receiving the impression” (1873 Comp. L. § 965). In *New Hampshire* an impression on the paper is a good public seal (1878 Gen. L. 44 § 10). In *New Jersey* any device affixed “by way of a seal” is sufficient by act of 1797 (Pat. Rev. 254; 1874 Rev. 741 § 1). In *New York* a court seal may be made by a stamp (3 Rev. Stat., 6th Ed., 1875 p. 439 § 24). In *Ohio* “any character or mark intended for a seal” and wax, wafer or other adhesive substance or an impression on the paper alone is sufficient for any seal (1880 Rev. Stats. § 4). So, in *Oregon* a “stamp or impression made upon wax, wafer, paper or any other like substance upon which a visible and permanent impression can be made,” or “a wafer or wax attached to the instrument or a paper attached to it by an adhesive substance,” is a sufficient seal (1872 Deady Gen. L. 258 § 742). And in *Vermont* a public seal may be made by an impression on the paper (1862 Gen. Stats., Ed. 1870, p. 54 § 13). Where the statute provides only for public official or corporate seals, it may be inferred that private seals, being of less dignity, may be made in like manner.

¹Corrigan v. Trenton Del. Falls Co., 1 Halst. Ch. 52 (1845); Ross v. Bedell, 5 Duer 462 (1856); Curtis v. Leavitt, 15 N. Y. 9 (1857); Connolly v. Goodwin, 5 Cal. 220 (1855); Allen v. Sullivan, 32 N. H. 446 (1855); Hendee v. Pinkerton, 14 Allen 381 (1867); Foster, J., saying in this case, “such an impression of a seal has never been held insufficient, and after our courts have allowed wafers instead of wax, and paper with gum or mucilage instead of wafers, there seems little reason why we should hesitate also to allow the sufficiency of a corporate seal on the paper itself.” And it is said by Grier, J., in Pillow v. Roberts, 13 How. 472 (1851), “it is the seal which authenticates and not the substance on which it is impressed.” See, too, Sugden on Powers (1st Am. Ed.) 236. But see, *contra*, Mitchell v. Union Life Ins. Co., 45 Me. 105 (1858).

²Gillespie v. Brooks, 2 Redf. 350 (1876); or a revenue stamp stuck on for a seal, Van Bokkelen v. Taylor, 62 N. Y. 108 (1875); but not a ribbon passed through slits in the paper, Duncan v. Duncan, 1 Watts 322 (1833). Anything attached for a seal is sufficient by statute in *California* (Code Civ. Proc. § 11931), as regards public seals.

³Conine v. Junction, &c., and B. R. R., 3 Houst. 288 (1866). But see, Moore v. Leseur, 18 Ala. 606 (1851).

seal;¹ while the absence of all mention of it in the instrument leaves the fact of sealing to be proved.² In Virginia, on the contrary, such proof cannot be made by parol.³ In the words of Hornblower, C. J., in *Corlies v. Van Note*,⁴ "If an instrument is shown to us with a *seal* in fact, that is with wafer or wax affixed to it, the law pronounces it a *deed* and that whether anything is said *in* the instrument about a seal or not. * * * When a writing with nothing but a blot or scroll or flourish after the name is shown in court, we are bound to consider and treat it as a simple contract only, unless it appears by the writing itself or by the *his testibus* clause, that the party making it intended to do so under his hand and seal." And in this case it was declared to be a question for the court and not for the jury, to be determined *by inspection* whether an instrument be sealed or not.⁵ In other cases proof of the maker's signature has been

¹*Force v. Craig*, 2 Halst. 330, Ford, J., saying in this case. "The defendant demands evidence that the scroll was intended for a seal, but there needs no other proof than the instrument itself saying 'witness my hand and seal.' In this state of things the court and jury are bound to treat it as a sealed bill." *Lindsay v. State*, 15 Ala. 43 (1848).

²*Newbold v. Lamb*, 2 South. 449 (1819); *Corlies v. Van Note*, 1 Harr. (N. J.) 324. But other cases find in such scroll seal, although not referred to in the body of the instrument, a presumption in favor of an intention to seal, *Parks v. Duke*, 2 McCord 380; *Peasley v. Boatwright*, 2 Leigh 196; *Trasher v. Everhart*, 3 Gill & J. 234; *Giles v. Mauldin*, 7 Rich. L. 11 (1853). And in *Merritt v. Cornell*, 1 E. D. Smith 335, affirmed in the Court of Appeals, *Ingraham, J.*, says of a scroll not mentioned in the instrument, "Proof of the handwriting, with the fact of the seal being affixed and the possession by the plaintiff, is presumptive evidence of signing, sealing and delivery. * * * It is sufficient if the scroll be affixed at the time of delivery and execution, and that is presumed (in the absence of other proof) from the fact that the obligee is in possession of the instrument with the scroll attached."

³*Clegg v. Lemessurier*, 15 Gratt. 108 (1859); *Cromwell v. Tate's Exr.*, 7 Leigh 301 (1836); *Anderson v. Bullock*, 4 Munf. 442 (1815); *Baird v. Blaingrove*, 1 Wash. 170 (1793); *Austin v. Whitlock*, 1 Munf. 487 (1810); *Jenkins v. Hurt's Exr.*, 2 Rand. 446 (1824). In *Anthony v. Harrison*, 14 Hun 201, Mr. Calvin Frost, the referee, says of the foregoing Virginia cases that they "are conceded to hold a doctrine not in harmony with the common law. * * * The weight of authority is largely against the Virginia cases." To like effect, see *Parks v. Duke*, 2 McCord 380 (1823); *Peasley v. Boatwright*, 2 Leigh 196 (1830); *Trasher v. Everhart*, 3 Gill & J. 234 (1831). In *Peasley v. Boatwright*, *Anderson v. Bullock* and *Austin v. Whitlock*, *supra*, there were scroll seals after the words "witness our hands."

⁴1 Harr. (N. J.) 324.

⁵So, too, *Moore v. Leseur*, 18 Ala. 606 (1851); *Van Bokkelen v. Taylor*, 62 N. Y. 108 (1875); *Duncan v. Duncan*, 1 Watts 322 (1833).

held to raise a presumption in favor of the seal having been properly affixed.¹

But it may be shown in equity that a seal was omitted by mistake after the clause "witness my hand and seal;"² or affixed by mistake;³ or that one seal was intended for the seal of both A. and B., who executed a paper which concluded "witness *our* hands and seals" and placed but one seal opposite both names;⁴ or that a seal affixed to the obligee's name at the end of the condition of a bond was intended for the obligor's name placed by mistake at the beginning of the condition and without seal.⁵ If a note, joint in form, is sealed by one maker and not by the other, it will be treated as the note of one and the bond of the other,⁶ and cannot be enforced against them in a joint action as their joint contract.⁷

§ 74. **Corporation Seals—Coupon Bonds.**—It was once thought that a corporation seal was only equivalent to its signature, and indeed the only way by which it could execute a written instrument.⁸ And therefore such seal was held not to make a specialty of the instrument, which remained a simple contract notwithstanding its execution under a corporate seal.⁹ It is now, however, established that a cor-

¹Merritt v. Cornell, 1 E. D. Smith 335 (1821); Muckleroy v. Bethany, 27 Tex. 551 (1864).

²McCown v. Sims, 69 N. C. 159 (1873). See, too, McCarley v. Supervisors, 58 Miss. 483 (1880), where such instrument was regarded as sealed.

³Lynam v. Califer, 64 N. C. 572 (1870).

⁴Stabler v. Cowman, 7 Gill & J. 284 (1835); Twitty v. Houser, 7 So. Car. 153 (1875); Bowman v. Robb, 6 Penna. St. 302 (1847).

⁵Argenbright v. Campbell, 3 Hen. & M. 144, 198 (1808).

⁶Biery v. Haines, 5 Whart. 563 (1840); Rankin v. Roler, 8 Gratt. 63 (1851).

⁷Biery v. Haines, *supra*. But see, *contra*, Rankin v. Roler, *supra*.

⁸Byles 70; 2 Daniel 496; 1 Parsons 163; Story on Prom. Notes § 74; Angell & Ames on Corp. § 219. Such seal is sometimes available to show the instrument to have been intended for an act of the corporation and not of the individual officer signing it, Dutton v. Marsh, L. R. 6 Q. B. 361 (1871).

⁹"It would seem that the seal in such case is simply inoperative, not interfering with the negotiability of the instrument, if otherwise valid, and not converting into a deed a document purporting to be negotiable, but which the corporation had no power to make. The bill or note, if good at all, is good as a bill or note, and not as a money bond or as an acknowledgment under seal of indebtedness," Green's Brice's Ultra Vir. 162; Aggs v. Nicholson, 1 H. & N. 165; 25 L. J. Exch. 348.

poration note or other contract can be executed without the corporate seal.¹ A corporation may use a common seal.²

Independently of the statutes above referred to, bills and notes executed by corporations under their corporate seal have been held to be negotiable and subject to all the rules of commercial paper.³ And it is now well established that

¹ Byles 71; 2 Daniel 496; 1 Parsons 163; Story on Prom. Notes § 74; Danforth v. Schoharie Tpk. Co., 12 Johns. 227; Union Bank v. Ridgely, 1 Harr. & G. 413 (1827); Many v. Beekman Iron Co., 9 Paige 188 (1841); Mechanics' Bank v. Bank of Columbia, 5 Wheat. 326; Legrand v. Hampden College, 5 Munf. 324 (1817); Hamilton v. Lycoming Mut. Ins. Co., 5 Penna. St. 339 (1847); American Ins. Co. v. Oakley, 9 Paige 496 (1842); Bank of Columbia v. Patterson, 7 Cranch 305 (1813); Creswell v. Holden, 3 MacArth. 579 (1879); Commercial Bank v. Newport Mfg. Co., 1 B. Mon. 13 (1840). And this rule has been extended to municipal corporations, Fourth School Dist. v. Wood, 13 Mass. 199 (1816); 1 Dillon Mun. Corp. § 374. And a note to a corporation may be transferred by its agent by an assignment not under seal, Garrison v. Combs, 7 J. J. Marsh. 84 (1831); or by indorsement not under seal by the cashier of a bank, Fleckner v. U. S. Bank, 8 Wheat. 338, 357 (1823).

The English courts have held more strictly than those of the United States to the old rule requiring corporate contracts to be sealed, Angell & Ames on Corp. § 236; Slack v. Highgate Archway Co., 5 Taunt. 792; Lamprell v. Guardians of the Poor, 3 Exch. 306; Diggle v. London and B. Ry., 5 Exch. 442; Church v. Imperial Gas Co., 6 Ad. & El. 846; Mayor, &c., of Ludlow v. Charlton, 6 M. & W. 815; East London Water Co. v. Bailey, 4 Bing. 283; Arnold v. Mayor of Poole, 4 Man. & Gr. 861; Copper Miners' Co. v. Fox, 16 Q. B. 229. But contracts of slight importance and constant recurrence are excepted from this rule, East London Water Co. v. Bailey, *supra*; Australian S. N. Co. v. Marzetti, 11 Exch. 234; Church v. Imperial G. L. Co., 6 Ad. & El. 846; London G. L. Co. v. Nicholls, 2 C. & P. 365; Beverley v. Lincoln G. L. Co., 6 Ad. & El. 829. A distinction has also been made in favor of *executed* contracts, as of themselves implying a consideration, Mayor of Stafford v. Till, 4 Bing. 75; East London Water Co. v. Bailey, *supra*; Beverley v. Lincoln G. L. Co., *supra*; Dean of Rochester v. Pierce, 1 Campb. 466; Fishmongers' Co. v. Robertson, 5 Man. & Gr. 131; Lowe v. L. & N. W. Ry., 18 Q. B. 633, this and most of the foregoing cases being actions for use and occupation; but the validity of this distinction is questioned in Paine v. Strand Union, 8 Q. B. 340; Church v. Imperial G. L. Co., *supra*.

² Thus, in Mill Dam Foundry v. Hovey, 21 Pick. 417 (1839), an ordinary wafer seal affixed to a corporation contract after the words "witness our hands" was held a sufficient seal for the corporation. See, too, Bank of Middlebury v. Rutland Ry., 30 Vt. 159.

³ Jackson v. Myers, 43 Md. 452 (1875); Muth v. Dolfield, *Ib.* 466; Central Nat. Bank v. Charlottesville R. R., 5 So. Car. 156 (1873). *In re* Imperial Land Co., L. R. 11 Eq. 498 (1870), Sir R. Malins, V. C., said: "I agree with Mr Chitty that a debenture merely means an instrument which shows that the party owes and is bound to pay. It is not less so because at the top it is called a debenture bond. * * * Every principle of public policy calls upon me to repudiate the notion that such documents are to be treated like bonds or choses in action in which the equities between the parties can be entered into," and quoted with approval the language of Lords Justices Wood and Selwyn in *Ex parte* City Bank, L. R. 3 Ch. 758 (1868). In this case (p. 762) Sir W. P. Wood, L. J., says of a similar instrument, "It is under seal; but so, in the absence of special powers, must every instrument

corporation bonds under seal, if drawn in a negotiable form, are negotiable like bills and notes and possess in general all the qualities of commercial paper.¹

be which is executed by a corporation. If there had been in these articles any provision such as we often find providing for the issuing negotiable instruments not under seal, the argument from the use of a seal would have had much more weight."

¹This has been held of corporate bonds *generally*: *Colson v. Arnot*, 57 N. Y. 253 (1874); *Evertson v. Nat. Bank*, 66 N. Y. 14 (1876); *Carr v. Le Fevre*, 27 Penna. St. 413 (1856); *Hotchkiss v. Nat. Bank*, 21 Wall. 354 (1874); *In re Tallassee Mfg. Co.*, 64 Ala. 537 (1879). But not a corporate "debenture" in its terms conditional, *Crouch v. Credit Foncier*, L. R. 8 Q. B. 374. In *Carr v. Le Fevre*, 27 Penna. St. 418, Lewis, C. J., said of such bonds payable to bearer: "Such bonds are not strictly negotiable under the law merchant, as are promissory notes and bills of exchange. They are, however, instruments of a peculiar character, and, being expressly designed to be passed from hand to hand and by common usage actually so transferred, are capable of passing by delivery so as to enable the holder to maintain an action on them in his own name." So, too, *Morris Canal and Banking Co. v. Fisher*, 1 Stock. 699.

Also of *Railroad Bonds*: *Chapin v. Vt. and Mass. R. R.*, 8 Gray 575 (1857); *White v. Vt. and Mass. R. R.*, 21 How. 575 (1858); *Junction R. R. v. Cleneay*, 13 Ind. 161 (1859); *Moran v. Comrs. Miami Co.*, 2 Black 722 (1862); *Brainerd v. N. Y. & N. H. R. R.*, 25 N. Y. 496, affirming 10 Bosw. 332 (1862); *Conn. Mut. Ins. v. C. C. & C. R. R.*, 41 Barb. 9 (1863); *Birdsall v. Russell*, 29 N. Y. 220 (1864); *Wickes v. Adirondack Co.*, 2 Hun 112; S. C. 4 T. & C. 250 (1874); *Langston v. South Car. R. R.*, 2 So. Car. 248 (1870); *Murray v. Lardner*, 2 Wall. 110 (1876); *Nat. Exch. Bank v. H. P. & F. R. R.*, 8 R. I. 375 (1866); *Grand Rapids and Ind. R. R. v. Sanders*, 17 Hun 552 (1879); *Comrs. of Knox Co. v. Aspinwall*, 21 How. 539; *State v. Cobb*, 64 Ala. 127 (1879). The contrary was held in *Jackson v. Y. & C. R. R.*, 48 Me. 147 (1858); but this case is not supported, *Evertson v. Nat. Bank*, 66 N. Y. 14. In *Moran v. Comrs.*, *supra*, they are called by Wayne, J., "commercial securities." In *Junction R. R. v. Cleneay*, *supra*, Perkins, J., speaks of them as "not governed exactly by the law merchant," but "entitled to all the privileges of commercial paper." While in *White v. R. R.*, *supra*, Nelson, J., says of their negotiability that "the usage and practice of the companies themselves, and of the capitalists and business men of the country dealing in them, as well as the repeated decision or recognition of the principle by courts and judges of the highest respectability, have settled the question."

So of *Municipal Bonds*: 1 *Dillon Mun. Corp.* § 405; *Craig v. City of Vicksburg*, 31 Miss. 216 (1856); *Bank of Rome v. Rome*, 19 N. Y. 20 (1859); *Gelpcke v. City of Dubuque*, 1 Wall. 175 (1863); *City of Aurora v. West*, 22 Ind. 88 (1864); *Gould v. Town of Sterling*, 23 N. Y. 464 (1861); *Force v. City of Elizabeth*, 1 Stew. Eq. 406; *Durant v. Iowa County*, 1 Woolw. C. C. 72 (1864); *Thomson v. Lee Co.*, 3 Wall. 327 (1865); *Arents v. Commonwealth*, 18 Gratt. 750 (1868); *Boyd v. Kennedy*, 9 Vr. 146; *School Dist. v. State*, 8 Neb. 168 (1879); *Lindsley v. Diefendorf*, 43 How. Pr. 357 (1872); *Marsh v. Little*, 1 Hun 554; S. C. 4 T. & C. 116 (1874); *Society for Savings v. New London*, 29 Conn. 174 (1860); *Town of Eagle v. Kohn*, 84 Ill. 292 (1876); *Weith v. City of Wilmington*, 68 N. C. 24; *Belo v. Comrs. Forsyth Co.*, 76 N. C. 489 (1877); *City of San Antonio v. Lane*, 32 Tex. 405 (1869); *Board v. T. & P. Ry. Co.*, 46 Tex. 316 (1876); *Comrs. of Marion Co. v. Clark*, 4 Otto 278 (1876). Such bonds are declared to possess "all the qualities of commercial paper" by Swayne, J., in *Gelpcke v. City of Dubuque*, *supra*, and by Miller, J., in *Durant v. Iowa County*, *supra*, and by Davis, J., in *Thomson v. Lee*, *supra*. The decision denying the negotiability of such bonds in *Diamond v. Law-*

rence County, 37 Penna. St. 353 (1860), cannot be regarded as authority, at least beyond the limits of the State of Pennsylvania. But see, *Hopper v. Town of Covington*, 8 Fed. Rep. 777 (1881), where the bonds were issued without authority.

So, of *Public Securities* :

U. S. Treasury Notes, *Vermilye v. Adams Exp. Co.*, 21 Wall. 138 (1874); *Dinsmore v. Duncan*, 57 N. Y. 573 (1874); *Seybel v. Nat. Currency Bank*, 54 N. Y. 288 (1873); *Frazer v. D'Invilliers*, 2 Penna. St. 200 (1845); *Ringling v. Kohn*, 4 Mo. App. 59 (1877).

State Bonds, *Delafield v. State of Illinois*, 2 Hill 177 (1841); or a bond of the King of Prussia payable "to every person who should for the time then being be the holder," *Gorgier v. Mieville*, 3 B. & C. 45 (1824).

State Improvement Bonds, *Finnegan v. Lee*, 18 How. Pr. 186.

But an *East India* bond, payable to A. B., "his executors and assigns," was held in England not negotiable in *Glyn v. Baker*, 13 East 509. In the next year, however, an act was passed to make such bonds negotiable, 51 Geo. III. c. 64.

This is also true of *detached coupons* which are not generally under seal, although the bond to which they belong may be, 1 Dillon Mun. Corp. § 405 *n.*; *Gelpcke v. City of Dubuque*, 1 Wall. 175 (1863); *Thomson v. Lee*, 3 *Ib.* 327 (1865); *Haven v. Grand Junction R. R.*, 109 Mass. 88 (1871); *Burroughs v. Comrs. of Richmond Co.*, 65 N. C. 234 (1871); *Clark v. Iowa City*, 20 Wall. 583 (1874); *Evertson v. Nat. Bank of Newport*, 4 Hun 692; S. C., 66 N. Y. 14 (1875); *Ketchum v. Duncan*, 6 Otto 659 (1877); *Welsh v. First Div. R. R.*, 25 Minn. 314 (1878); *Nat. Exch. Bank v. H. P. & F. R. R.*, 8 R. I. 375 (1866). And also of coupons attached to a negotiable bond, *McCoy v. Washington Co.*, 3 Wall. Jr. 381. Such coupons must, however, contain words of negotiability, *Jackson v. York & C. R. R.*, 48 Me. 147 (1858); *Augusta Bank v. Augusta*, 49 *Ib.* 507.

A sealed bond with the payee's name in blank, although of negotiable form, is now held not to be negotiable in England, *Hibblewhite v. McMorine*, 6 M. & W. 200, overruling *Texira v. Evans*, 1 Austr. 228. In the United States there is a diversity of opinion on this point. Such bonds have been held to be negotiable in *White v. Vt. & Mass. R. R.*, 21 How. 575; *Hubbard v. N. Y. & H. R. R.*, 36 Barb. 286; *Dutchess Co. Ins. v. Hachfield*, 1 Hun 675; S. C., 4 T. & C. 158; *Boyd v. Kennedy*, 9 Vr. 146; *Chapin v. Vt. & Mass. R. R.*, 8 Gray 575. For many other authorities both *pro* and *contra*, see Judge Stewart's note in *City of Elizabeth v. Force*, 2 Stew. Eq. 592; also *Preston v. Hull*, 23 Gratt. 600; S. C., 21 Am. L. Reg. 699.

III. DATE.

- 75. Date—When Necessary.
- 76. Blanks—Omission of Date.
- 77. Delivery Shown by Date—Parol Evidence.
- 78. Mistake in Date.
- 79. Ante-dating—Post-dating.
- 80. Post-dated Checks.
- 81. Local Date.
- 82. Date of Indorsement.
- 83. Acceptance.
- 84. Alteration—Misdescription.
- 85. Limitation Affected by Date.

§ 75. **Date—When Necessary.**—It is usual to express in all commercial paper the time and place at which it is drawn and given. *Date* in its full sense comprehends both statement of time and place, although it is often used with reference to the former only. The date is commonly placed at the upper right-hand corner of the instrument, *e. g.* New York, May 1st, 1882. The position is immaterial, whether at top or bottom.¹ By the English common law no date whatever is essential.² It is, however, required by British statute in the case of promissory notes for more than 20s. and less than £5, payable to bearer on demand.³ Formerly printed dates were prohibited in England in the case of

¹ 1 Daniel 92; 1 Parsons 388; *Sheppard v. Graves*, 14 How. 505 (1852).

² Byles 79; Chitty 171; 1 Daniel 92; 1 Edwards § 171; 1 Parsons 41; *Story on Bills* § 37; *Story on Prom. Notes* § 45; *De la Courtier v. Bellamy*, 2 Show. 422; *Hague v. French*, 3 Bos. & P. 173; *Giles v. Bourne*, 6 M. & S. 73; *Vanderveer v. Ogburn*, Penn. 67 (N. J. 1806); *Seldonridge v. Connable*, 32 Ind. 375 (1869); *Pierce v. Richardson*, 37 N. H. 306 (1858); *Dean v. De Lezardi*, 24 Miss. 424 (1852); *Whiting v. Daniel*, 1 Hen. & M. 390 (1807); *Stout v. Cloud*, 5 Litt. 205 (1824). It is said, however, by Sutherland, J., that "we all know that it is necessary to its free and uninterrupted negotiability," *Mitchell v. Culver*, 7 Cow. 336 (1827).

³ 26 and 27 Viet. c. 105, requiring such notes to bear date at or before the time of issue. This law formerly embraced also negotiable bills and drafts 17 Geo. III. c. 30 § 1. This act was repealed by 3 Geo. IV. c. 70, but was revived by 7 Geo. IV. c. 6, except as to checks on a banker. The exemption of checks from stamp duty by 55 Geo. III. c. 184, and 9 Geo. IV. c. 49 extended only to those specifying the place where they were issued and bearing date on or before the day on which they were issued. A false statement of the place avoided the instrument, *Walters v. Brogden*, 1 Y. & J. 457; *Field v. Woods*, 7 Ad. & El. 114; *Rex v. Pooley*, 3 Bos. & P. 311; *Bopart v. Hicks*, 3 Exch. 1. Under this rule "*Dorchester Old Bank, established in 1786,*" printed on a check, was held sufficient, *Strickland v. Mansfield*, 8 Q. B. 675; but not the heading "*Oxford, Worcester, &c., Railway,*" *Ward v. Oxford Railway Co.*, 2 DeG. M. & G. 750 (1852).

promissory notes payable to bearer on demand;¹ but this is now repealed.²

No American statutes, it is believed, require notes, bills or checks to bear a date.³ It seems, however, hardly necessary to urge upon the careful draftsman a full and accurate expression both of the time and place of making. Such expression avoids all ambiguity in instruments made payable at a fixed time after date, as well as trouble likely to arise under stamp acts and statutes of limitation, and usury and questions as to a party's capacity to contract at that particular time. And the local date makes more easy the determination of what local law shall govern the contract. Indeed, Mr. Chitty suggests that "to prevent intentional or accidental alteration, which may invalidate the instrument even in the hands of an innocent holder, it may be advisable to write the date at *full length* in words."⁴ The question is also mooted by Mr. Justice Story whether a drawee may not refuse to pay an undated bill.⁵ A date is now generally required by foreign statutes.⁶ But, although

¹55 Geo. III. c. 184 § 18.

²23 and 24 Vict. c. 111 § 19.

³In *California* "a negotiable instrument may be with or without a date" (Civ. Code 1872 § 8091). "Any date may be inserted by the maker * * * whether past, present or future, and the instrument is not invalidated by his death or incapacity at the time of the nominal date" (*Ib.* 8094). In *Dakota* the above-mentioned provisions of the California Code have been copied (Rev. Code 1877 §§ 1825, 1828).

⁴Chitty on Bills (12th Am. Ed.) 171.

⁵Story on Bills § 37.

⁶The date, including both place and day, month and year of making, must be stated in bills of exchange, drafts and promissory notes made payable to order in the *Argentine Republic* (Code 1862 Art. 776). This article also provides that the want of a date shall not affect the validity between immediate parties; *Austria* (Exch. Law 1850 Arts. 4, 96); *Belgium* (Code Napoleon); *Bolivia* (Code Com. 1834 Arts. 362, 463, 469); *Brazil* (Code Com. 1850 Arts. 354, 427); *Chili* (Code Com. 1865 Arts. 633, 771); *Colombia* (Code Com. 1853 Arts. 384, 517); *Costa Rica* (Code Com. 1853 Arts. 373, 510); *Denmark* (Act of 1825 p. 74 § 7); *Ecuador* (Code Com. 1829 Arts. 426, 563); *France* (Code Napoleon 1807 § 188, altering in this respect the ordinance of 1673, Art. 1, Tit. V., which did not so require); *Germany* (Exch. Law 1848 p. 87 Arts. 4, 96); *Greece* (Act of 1835 establishing the Code Napoleon); *Guatemala* (Ordinances of Bilbao 1774 ch. 13 § 2; ch. 14 § 4); *Hayti* (Act of 1826 adopting the Code Napoleon); *Holland* (Code Com. 1838 Arts. 100, 208, 210); *Honduras* (Ordinances of Bilbao, *supra*); *Hungary* (Law of 1860 ch. 1 § 14); *Italy* (Code Com. 1865 Art. 196); *Mexico* (Code Com. 1854 Art.

a date is required by the Code Napoleon, the want of it renders the instrument invalid *as commercial paper*,¹ but does not avoid it.

§ 76. **Blanks—Omission of Date.**—A blank left intentionally or inadvertently by the maker for the date, implies, like every other blank, an authority to the holder to fill it up;² even after the death of one member of a firm in whose name the note with blank date was given.³ And it is said that this authority extends even to ante-dating a note, so far at least as to make it valid in the hands of a *bona fide* holder;⁴ but not where the holder has notice of its being ante-dated.⁵ It is to be observed, moreover, that inasmuch as a note or bill is complete without any date, the absence of a date, even

223); *Nicaragua* (Code Com. 1869 Art. 241, as to bills at least); *Paraguay* (Ordinances of Bilbao, *supra*); *Peru* (Law of 1853 Art. 381); *Portugal* (Code Com. 1833 Art. 426, as to notes only); *Russia* (Law of 1832 Art. 541); *San Domingo* (Law of 1844 adopting the Code Napoleon); *Spain* (Code Com. 1829 Arts. 426, 563); *Sweden and Norway* (Law of 1851 ch. 1 § 1, as to bills only); *Switzerland* (Laws: St. Gall 1784 Tit. I. § 1; Canton Glarus 1852 §§ 4, 79; Zurich 1805 Tit. 1 § 1; Aargau 1857 § 7; Basle 1863 § 3); *Uruguay* (Com. Code 1865 Art. 789); *Venezuela* (Code Com. 1862 Art. 1). See, as to the Code Napoleon, Bedarride's *Droit Commercial*, vol. 1 p. 79; and as to the earlier French law, Pothier, *Contrat de Change*, p. 26; Story on Bills § 38. The German statute requiring expression of time and place of making is satisfied by a date giving any time and place, and does not require the true time or place to be given, but only *a* time and place (Thöl W. R. 153, 154). Issuing a check without date, or with a false date, is punishable by fine of six per cent. of the face of the check in France (Law of 1865 Art. 6). In *Zurich* a blank date is at the risk of the indorser, as well as an entire want of date (Law of 1805 § 23).

¹ Bedarride, *Droit Commercial*, vol. 1 p. 79.

² 1 Daniel 92; 1 Edwards §§ 88, 172; Story on Prom. Notes § 11 n. 1; 1 Parsons 115; *Michigan Bank v. Eldred*, 9 Wall. 544 (1869); *Page v. Morrell*, 3 Keyes 117 (1866); S. C., 3 Abb. App. Dec. 433; *Mitchell v. Culver*, 7 Cow. 336 (1827); *Androscoggin Bank v. Kimball*, 10 Cush. 373 (1852); *Lennig v. Ralston*, 23 Penna. St. 137 (1854); *Shultz v. Payne*, 7 La. An. 222 (1852); *Witte v. Williams*, 8 So. Car. 290 (1876); *Fullerton v. Sturges*, 4 Ohio St. 529 (1855). And see English Bills of Exchange Act of 1882 § 12. And this inference is clear where the bill is made payable a certain number of days "after date." *Shultz v. Payne*, *supra*. And the date may be added in filling up a blank indorsement, *Maxwell v. Van Sant*, 46 Ill. 58 (1867). As to filling a blank date in a deed, see *Whitting v. Daniel*, 1 Hen. & M. 390 (1807), where the act was held to be an alteration, but immaterial.

³ *Usher v. Dauncey*, 4 Campb. 97 (1814). But it has been held that a blank date cannot be filled after the death of the drawer, *Michigan Ins. Co. v. Leavenworth*, 30 Vt. 11 (1856).

⁴ *Page v. Morrell*, 3 Abb. App. Dec. 433 (1866); 3 Keyes 417.

⁵ 1 Parsons 115; *Emmons v. Meeker*, 55 Ind. 321 (1876); *Goodman v. Simonds*, 19 Mo. 106 (1853).

though a blank has been apparently left for it, is not conclusive, but only *prima facie* evidence of authority to the holder to insert a date. Whether there be such authority is a question for the jury.¹

§ 77. **Delivery Shown by Date—Parol Evidence.**—Like other contracts a note or bill takes effect only upon its delivery for that purpose.² The time of delivery is in all cases a question of fact for the jury.³ Date and delivery are often spoken of as one thing. For instance, a reference to date in an instrument having no expressed date can only refer, in general, to the time of its delivery.⁴ If it is delivered subsequently to its date, it goes into effect upon delivery.⁵ But its construction, at least in computing the time it shall run, is determined by the date expressed and not by the time of

¹2 Parsons 552, 565; *Stout v. Cloud*, 5 Litt. 205 (1824); *Inglish v. Brene-man*, 5 Ark. 382 (1843); 9 *Ib.* 122 (1843). The authority of this latter case was denied, however, in *Page v. Morrell*, 3 Keyes 117.

²1 Daniel 74; 1 Parsons 49; *Story on Prom. Notes* § 56 n. 4; 1 Edwards § 171; *Cox v. Troy*, 5 B. & Ald. 474 (1822); *Abrey v. Crux*, L. R. 5 C. P. 42 (1869); *Ex parte Hayward*, L. R. 6 Ch. App. 546 (1871); *Marvin v. McCullum*, 20 Johns. 288 (1822); *Powell v. Waters*, 8 Cow. 669 (1826); *Chamberlain v. Hopps*, 8 Vt. 94 (1836); *Woodford v. Dorwin*, 3 Vt. 82 (1830); *Clough v. Davis*, 9 N. H. 500 (1838); *Flanagan v. Meyer*, 41 Ala. 132 (1867); *Hill v. Dunham*, 7 Gray 543 (1856); *Hilton v. Houghton*, 35 Me. 143; *Smith v. Foster*, 41 N. H. 215 (1860); *Pierce v. Richardson*, 37 *Ib.* 306 (1858); *Fritsch v. Heisler*, 40 Mo. 555 (1867); *King v. Fleming*, 72 Ill. 21 (1874). So, in the language of Kent, C. J.: "If they had been previously drawn, they had no force while in the possession and under the control of the maker. To all legal purposes the notes are to be considered as made or drawn when they were delivered," *Lansing v. Gaine*, 2 Johns. 303 (1807). It follows that a note dated before, and delivered after, a statute rendering it illegal, is controlled by the statute, *Bayley v. Taber*, 5 Mass. 286 (1809). Where the instrument is not dated, it may be shown by parol that it was to take effect on some other day than that of its delivery, if it contains no express provision as to this point, *Davis v. Jones*, 17 C. B. 625 (1856).

³*Hill v. Dunham*, 7 Gray 543 (1856).

⁴*Chitty* 171; *Bytes* 79; *De la Courtier v. Bellamy*, 2 Show. 422; *Hague v. French*, 3 Bos. & P. 173; *Giles v. Bourne*, 6 M. & S. 73; *Armitt v. Breame*, 2 Ld. Raym. 1076 (1704), in construction of an award. So, in construction of a covenant, "when there is no date or an impossible date, that word must mean delivery," *Bayley, J., in Styles v. Wardle*, 4 B. & C. 908 (1825). See, too, *Seldonridge v. Connable*, 32 Ind. 375 (1869).

⁵If a partnership note be delivered after the dissolution of the firm, although drawn and dated before, it cannot relate back so as to bind a partner having no share in making or delivering it, *Woodford v. Dorwin*, 3 Vt. 82 (1830). The same principle applies where between date and delivery a statute is passed prohibiting such instrument, *Bayley v. Taber*, 5 Mass. 286 (1809).

delivery.¹ Where, on the other hand, a note is made payable so many days from date, and no date is expressed, it falls due so many days from its delivery, and parol evidence is admissible to show when that was.² If the time of delivery cannot be ascertained, the time when its legal existence can first be proved will be taken to be the time of its date or delivery.³

Where there is a date expressed in the instrument, this is *prima facie* evidence of the time of its delivery.⁴ But bank notes, which are frequently re-issued, are an exception to this

¹ 1 Edwards § 171; 1 Parsons 49; *Powell v. Waters*, 8 Cow. 669 (1826); *Luce v. Shoff*, 70 Ind. 152 (1880). So, where a note was made payable six months after date and post-dated one year, *Bumpass v. Timms*, 3 Sneed 459 (Tenn. 1856).

² *Richardson v. Ellett*, 10 Tex. 190 (1853). To the same effect as to parol evidence, see *Byles* 123; *Story on Bills* § 37; *Davis v. Jones*, 25 L. J. C. P. 91; S. C., 17 C. B. 625; *Giles v. Bourne*, 6 M. & S. 73 (1817). In like manner the real date of an undated acceptance may be shown by parol, *Kenner v. Creditors*, 10 Mart. 17 (La. 1829). But an indorser, whose indorsement bears no date, cannot set up that it was made on Sunday and therefore not binding upon him, in defense to an action brought by a subsequent accommodation indorser without notice, *Greathead v. Walton*, 40 Conn. 226 (1873).

³ 1 Parsons 387; *Story on Prom. Notes* § 45. In *Mahier v. Le Blanc*, 12 La. An. 207 (1857), a draft with a date, but by Louisiana law undated because not formally executed before a notary but *sous seing prive*, was held insufficient to support a judgment rendered on it before the date of protest, that date being considered the first legal evidence of its existence.

⁴ *Byles* 79; *Chitty* 171; 1 Edwards § 174; 1 Parsons 41, 49; *Chalmers Dig.* 17; *Roberts v. Bethell*, 12 C. B. 778 (1852); *Anderson v. Weston*, 6 Bing. N. C. 296; S. C., 8 Scott 893; *Taylor v. Kinloch*, 1 Stark. 175; *Obbard v. Betham*, 1 Moo. & M. 486; *Smith v. Battens*, 1 Moo. & R. 341; *Cowing v. Altman*, 71 N. Y. 435 (1877), reversing 5 Hun 556; *Sayre v. Wheeler*, 31 Iowa 112 (1870); *Emery v. Vinall*, 26 Me. 295 (1846). And the same is true of an account stated, *Sinclair v. Baggaley*, 4 M. & W. 312 (1838); and of a book account showing a sale of personalty, *Bustin v. Rogers*, 11 Cush. 346 (1853), and of a deed, *Lyerly v. Wheeler*, 12 Ind. 290 (1851). But see, *Cowie v. Harris*, 1 M. & M. 141, and *Rose v. Rowercroft*, 4 Campb. 245, overruling this doctrine as to third persons, so far as commercial paper is concerned. And this presumption does not extend to the bill of a bankrupt to prove the date of his debt under the English bankruptcy act, *Anderson v. Weston*, *supra*. Between parties, however, this principle is so far true that where a note bore date on Thursday, and there was evidence of its being signed on Sunday, but no evidence as to the time of its delivery, the presumption of validity arising out of its date sustained it as a valid instrument, *Dohoney v. Dohoney*, 7 Bush 217 (1870). As Sunday by the statute of Massachusetts extends only from midnight to sunset, a note dated on Sunday is not necessarily made within the hours of the legal Sunday, nor, it seems, is there a presumption to that effect, *Hill v. Dunham*, 7 Gray 543 (1856); *Nason v. Dinsmore*, 34 Me. 391 (1852). And see, *Ray v. Catlett*, 12 B. Mon. 532 (1851), as to the particularity required in Kentucky in pleading that a note was executed and delivered on Sunday.

rule.¹ The court will take notice of the day of the week on which a given date falls.² The date of a note is also *prima facie* the date of an undated indorsement.³ On the other hand, where an impossible date (*e. g.* September 31st) is expressed, the last day of the month is assumed to be the date intended.⁴ But where a bill of exchange was dated on Sunday, it was held, in favor of an undated acceptance, that there was no presumption of the acceptance having been made on that day.⁵ And the date is in no case conclusive upon the immediate parties, but delivery may be shown to have been made upon some other day.⁶ Where a firm note, dated before, was given after dissolution of the partnership, that fact may be shown in defense by the outgoing partner.⁷

§ 78. **Mistake in Date.**—It is also true that a mistake of date may be shown between immediate parties.⁸ So, it may be shown that an instrument dated on Sunday was really delivered on another day and therefore valid;⁹ and in like

¹Wright *v.* Douglass, 3 Barb. 554 (1848); Farmers' and Mechanics' Bank *v.* White, 2 Sneed 482 (Tenn. 1855); Greer *v.* Perkins, 5 Hamph. 588 (1845).

²Chrisman *v.* Tuttle, 59 Ind. 155 (1877). So, as to the calendar in general, Reed *v.* Wilson, 12 Vroom 29 (1879); 9 Cent. L. J. 304, *s. c.* But see, Hill *v.* Dunham, 7 Gray 543 (1856), in which case it was left for the jury to determine whether a note was made before or after sunset, that being the end of the statutory Sunday.

³Burnham *v.* Webster, 19 Me. 232 (1841); Dodd *v.* Dody, 98 Ill. 393 (1881). If, however, the indorsement was actually made afterward, this presumption will not make it relate back to the date of the note, Brown *v.* Hull, 33 Gratt. 23 (1880). In like manner the date of an indorsement of payment is *prima facie* evidence of the time of such payment, Clapp *v.* Hale, 112 Mass. 368 (1873); Carter *v.* Carter, 44 Mo. 195 (1869). But see, *contra*, Shaffer *v.* Shaffer, 41 Penna. St. 51 (1861). And in general the date of the note is *prima facie* evidence of the time of accrual of the debt, Milliken *v.* Whitehouse, 49 Me. 527 (1860).

⁴1 Parsons 409, citing Wagner *v.* Kenner, 1 Rob. La. 120. But see, Styles *v.* Wardle, 4 B. & C. 908 (1825).

⁵Begbie *v.* Levi, 1 Crompt. & J. 180 (1830).

⁶1 Parsons 41; 2 *Ib.* 514; Cowing *v.* Altman, 71 N. Y. 435 (1877), reversing 5 Hun 556; Breck *v.* Cole, 4 Sandf. 80 (1850); Aldridge *v.* Branch Bank, 17 Ala. 45 (1849); Drake *v.* Rogers, 32 Me. 521 (1851); Dean *v.* De Lezardi, 24 Miss. 424 (1852).

⁷Woodford *v.* Dorwin, 3 Vt. 82 (1830).

⁸Buck *v.* Steffey, 65 Ind. 58 (1878); McSparran *v.* Neely, 91 Penna. St. 17 (1879); Germania Bank *v.* Distler, 4 Hun 633 (1875); Drake *v.* Rogers, 32 Me. 524 (1851). Although such correction will alter the time for maturity of the note, Drake *v.* Rogers, *supra*.

⁹Clough *v.* Davis, 9 N. H. 500 (1838); Lovejoy *v.* Whipple, 18 Vt. 379 (1846); Goss *v.* Whitney, 24 *Ib.* 187 (1852); Aldridge *v.* Branch Bank, 17 Ala. 45

manner that an instrument was really executed on Sunday and illegal, although dated on Monday.¹ An erroneous date may be corrected by a memorandum on the back or margin of the instrument, *e. g.* a memorandum showing that the year 1855 was intended instead of 1854.²

But parol evidence is not admissible to prove a mistake in date in a suit brought by an innocent purchaser and to his disadvantage.³ Thus, a note dated on Monday is good in the hands of a *bona fide* holder, although really executed and delivered on Sunday, and the illegal delivery cannot be proved against such holder.⁴ It may, however, be shown even against such holder that the note was ante-dated, where this was done for the purpose of fraudulently evading a statute prohibiting such a note.⁵ Parol evidence is also admissible to correct a misdescription of date, *e. g.* where a

(1849); *Drake v. Rogers*, 32 Me. 524 (1851); *Marshall v. Russell*, 44 N. H. 509 (1863); *Stacy v. Kemp*, 97 Mass. 166 (1867); *Hilton v. Houghton*, 35 Me. 143 (1853); *King v. Fleming*, 72 Ill. 21 (1874); *Smith v. Bean*, 15 N. H. 577 (1844). And in like manner it may be shown that a note executed on Sunday was not delivered until Wednesday, *Fritsch v. Heisler*, 40 Mo. 455 (1867); *King v. Fleming, supra*. And where the presumption of an indorsement on Sunday arose from a delivery on that day of a note dated on Monday, the indorsement may be proved to have been made on another day, in order to follow out the Arkansas rule of favorable construction of assignments, *Trieber v. Commercial Bank*, 31 Ark. 128 (1876). "All blank assignments shall be taken to have been made on such day as shall be of most advantage to the defendant," *Gantt's Dig. Ark.* § 570.

¹*Bank of Cumberland v. Mayberry*, 48 Me. 198 (1859); *Allen v. Deming*, 14 N. H. 133 (1843).

²*Byles* 101; *Fitch v. Jones*, 5 El. & Bl. 238; *Fanshawe v. Pelt*, 2 Hurlst. & N. 1. See, too, *Brutt v. Picard*, Ry. & Mood. 37 (1824); *Van Brunt v. Eoff*, 35 Barb. 501 (1861).

³1 Daniel 93; 1 Parsons 388; *Huston v. Young*, 33 Me. 85 (1851); the maker of a note dated in 1847 and payable in two years from date not being permitted to prove, at suit of a *bona fide* holder, that the note was actually made in 1848 and therefore not yet due. Nor can the maker of a note dated at Boston show against a *bona fide* holder for value that it was really made in New York and therefore void for usury, *Towne v. Rice*, 122 Mass. 67 (1877).

⁴*Clinton Nat. Bank v. Graves*, 48 Iowa 228 (1878); *Cranson v. Goss*, 107 Mass. 439 (1871); *Greathead v. Walton*, 40 Conn. 226 (1873); *Bank of Cumberland v. Mayberry*, 48 Me. 198 (1859); *State Capitol Bank v. Thompson*, 42 N. H. 369 (1861); *Knox v. Clifford*, 38 Wis. 651 (1875); *Vinton v. Peck*, 14 Mich. 287 (1866); *Ball v. Powers*, 62 Ga. 757 (1879). And, *a fortiori*, where it was dated and delivered on Monday and only signed on Sunday, *King v. Fleming*, 72 Ill. 21 (1874). But to entitle the holder to recovery in such case the burden of proof of good faith lies on him, *Allen v. Deming*, 14 N. H. 133 (1843).

⁵*Bayley v. Taber*, 5 Mass. 286 (1809).

mortgage securing the note described it as dated March 15th, and it was drawn March 15th but actually dated and delivered March 24th.¹

§ 79. **Ante-dating—Post-dating.**—In general a bill or note may be ante-dated or post-dated at the pleasure of the drawer or maker.² But it is not within the authority of a partner to give a post-dated firm check.³ And by English statute unstamped bank bills or notes cannot be post-dated under a penalty of £100.⁴ And all negotiable bills, notes and drafts under £5 must, in Great Britain, be dated before or on the day of making, under a penalty of £20.⁵ In general an ante-dated note is sufficiently proved by proof of its execution without proof of the date of execution, although it be shown to have been ante-dated.⁶ Ante-dating or post-dating an instrument, however, for a fraudulent purpose renders it invalid; *e. g.* dating a bill forward to evade the stamp duties;⁷ or ante-dating it to evade a prohibitory law;⁸ or a statute against usury.⁹ But the mere fact that the instru-

¹ *Dean v. De Lezardi*, 24 Miss. 424 (1852).

² Byles 79; Chalmer's Dig. 16; 1 Daniel 93; 1 Edwards § 173; 1 Parsons 41; Story on Prom. Notes § 48; *Pasmore v. North*, 13 East 517 (1811); *Usher v. Dauncey*, 4 Campb. 97 (1814); *Barker v. Sterne*, 9 Exch. 684 (1854), ante-date; *Gatty v. Fry*, L. R. 2 Exch. Div. 265 (1877), post-dated check; *Forster v. Mackreth*, L. R. 2 Exch. 163 (1867); *Emmanuel v. Roberts*, 9 B. & S. 121; *Bull v. O'Sullivan*, L. R. 6 Q. B. 209 (1871); *Dean v. De Lezardi*, 24 Miss. 424 (1852); *Aldridge v. Branch Bank*, 17 Ala. 45 (1849); *Bayley v. Taber*, 5 Mass. 286 (1809); *Drake v. Rogers*, 32 Me. 521 (1851); *Brewster v. McCardel*, 8 Wend. 478 (1832); *Richter v. Selin*, 8 S. & R. 425 (1822); *Gray v. Wood*, 2 Harr. & J. 328 (1808); *Luce v. Shoff*, 70 Ind. 152 (1880); *Union Bethel v. Sheriff*, 33 La. An. 1461 (1881). This is true of checks also, *Frazier v. Trow Printing Co.*, 24 Hun 281 (1881); *Gatty v. Fry*, L. R. 2 Exch. Div. 265 (1877). See, too, English Bills of Exchange Act 1882 § 13.

³ *Forster v. Mackreth*, L. R. 2 Exch. 163 (1867).

⁴ Geo. IV. c. 23 § 12; Byles 80.

⁵ Byles 80; 17 Geo. III. c. 30, revived by 7 Geo. IV. c. 6; repealed as to checks by 17 and 18 Vict. c. 83 § 9; temporarily repealed by 26 and 27 Vict. c. 105, 32 and 33 Vict. c. 85, 34 and 35 Vict. c. 95, and 38 and 39 Vict. c. 72.

⁶ *Gray v. Wood*, *supra*.

⁷ Byles 80; 1 Daniel 94; as to stamp act, *Field v. Wood*, 6 Dowl. P. C. 23; S. C., 7 Ad. & El. 114; *Serle v. Norton*, 9 M. & W. 309. But where a deed was executed on Sunday and ante-dated as of Saturday, although void on this account, it was held capable of ratification and validated thereby, *Love v. Wells*, 25 Ind. 503 (1865).

⁸ *Bayley v. Taber*, 5 Mass. 286 (1809).

⁹ *Williams' Exr. v. Williams*, 3 Green 255 (N. J. 1836). But where a note was given for a loan made in Georgia to a citizen of that State at a rate of

ment is post-dated throws no suspicion upon the good faith of a purchaser.¹ Nor does it subject a bill to such a defense as want of consideration, where that would not be otherwise admissible.² And if a bill or note be post-dated and one of the parties to it die before the day of its date arrive, it will still be valid in the hands of a *bona fide* holder for value.³

§ 80. **Post-dated Checks.**—A check should be, and commonly is, made payable forthwith. If it is payable at a future day, it is, properly speaking, a bill of exchange and not a check;⁴ unless this is rather apparent than real, as in the case of a check drawn after business hours on Saturday and dated on Saturday but made payable on Monday.⁵ In like manner a post-dated check is to all intents and purposes a bill of exchange,⁶ and should be stamped as such in England. The English Stamp Act formerly prescribed penalties for post-dating checks payable *to bearer* on demand.⁷ Under this act such post-dated checks were until 1870 void in the hands of original parties and subsequent holders with notice,⁸ and were not even admissible in such case as evidence of money paid;⁹ but were valid in the hands of a *bona fide*

interest lawful there and the note was signed by one of the parties in North Carolina, where such rate was usurious, dating it as if made in Georgia was held to be no evasion of the North Carolina usury law, *Davis v. Coleman*, 7 *red.* 424 (1847).

¹ *Brewster v. McCardel*, 8 *Wend.* 478 (1832).

² *Walker v. Geisse*, 4 *Whart.* 252 (1838).

³ *Chitty* 172; 1 *Parsons* 42; *Passmore v. North*, 13 *East* 517.

⁴ *Morrison v. Bailey*, 5 *Ohio St.* 13 (1855); *Bowen v. Newell*, 8 *N. Y.* 190 (1853), reversing 5 *Sandf.* 326; and see, *S. C.*, 2 *Duer* 584; 13 *N. Y.* 291; *Minturn v. Fisher*, 4 *Cal.* 35 (1854). But see, *contra*, *Brown v. Lusk*, 4 *Yerg.* 210 (1833).

⁵ *Andrew v. Blachley*, 11 *Ohio St.* 89 (1860).

⁶ *Allen v. Keeves*, 1 *East* 435 (1801); *Bradley v. Delaplaine*, 5 *Harr.* 305 (*Del.* 1850).

⁷ By the stamp act of 55 *Geo. III.* c. 184 § 13 (now repealed) checks payable to bearer on demand were made subject to a penalty, if post-dated, to be enforced against the drawer and against any one knowingly taking or paying the same. These penalties were continued in force by 16 and 17 *Vict.* c. 59 § 2; but are now repealed by 33 and 34 *Vict.* c. 99 (1870).

⁸ *Dunsford v. Curlew*, 1 *Fost. & F.* 702; *Serle v. Norton*, 9 *M. & W.* 309 (1842); *Austin v. Bunyard*, 6 *B. & S.* 685 (1865); *Whitwell v. Bennett*, 3 *Bos. & P.* 559 (1803).

⁹ *Serle v. Norton*, 9 *M. & W.* 309 (1842).

holder without notice.¹ But now, since 1870, such check, if stamped, is admissible in evidence, even where the holder has notice of its being post-dated.² And the act of 55 Geo. III., c. 184, never affected post-dated checks which were payable *to order*.³ A post-dated check being to all intents and purposes a bill of exchange, as we have seen, is payable only when the future day of its date arrives and is then payable on demand.⁴ And it is not by the law merchant entitled to grace.⁵

§ 81. **Local Date.**—It is usual to express the place as well as the time of making in the date of all commercial paper, and, as we have seen, this is required by many foreign statutes. It was also formerly required by the English statutes of 55 Geo. III., c. 184, and 9 Geo. IV., c. 49, so far as regarded the exemption of checks from stamp duty. At common law this was not necessary,⁶ nor is it made so by statute in the United States. Where such place is expressed it is *prima facie* the place of residence of the maker or drawer.⁷ A note without other place of payment named is not thereby made payable at the place named in the date.⁸ But in the

¹Austin v. Bunyard, 6 B. & S. 685 (1865).

²Gatty v. Fry, L. R. 2 Exch. D. 265 (1877); 33 and 34 Vict. c. 97 § 17.

³Emanuel v. Roberts, 9 B. & S. 121; Whistler v. Forster, 14 C. B. (N. S.) 248; Bull v. O'Sullivan, L. R. 6 Q. B. 209 (1871).

⁴Hill v. Gow, 4 Penna. St. 493 (1846); Mohawk Bank v. Broderick, 10 Wend. 305 (1833); affirmed 13 *Ib.* 133; Salter v. Burt, 20 *Ib.* 205 (1838); Gough v. Staats, 13 *Ib.* 549 (1835); Taylor v. Sip, 1 Vroom 289 (1863).

⁵2 Parsons 68.

⁶1 Edwards § 171; Story on Prom. Notes § 49.

⁷Duncan v. McCullough, 4 S. & R. 480 (1818); Sasseer v. Whitely, 10 Md. 98 (1856); Branch Bank v. Pierce, 3 Ala. 321 (1842); Robinson v. Hamilton, 4 Stew. & P. 91 (1833); Chapman v. Lipscombe, 1 Johns. 294 (1806); Taylor v. Snyder, 3 Den. 145 (1846). See, too, Hyatt v. James, 2 Bush 463 (1867); Sprague v. Tyson, 44 Ala. 338 (1870). So far at least as to lead one to suppose that the maker "might be found there," Pierce v. Whitney, 22 Me. 113 (1842). But this has been denied in Pennsylvania and such place held to indicate the place of drawing the instrument and nothing more, Lightner v. Will, 2 Watts & S. 140 (1841).

⁸Anderson v. Drake, 14 Johns. 114 (1817); Bank of America v. Woodworth, 18 *Ib.* 322 (1820); Galpin v. Hard, 3 McCord 394 (1825); Burrows v. Hannegan, 1 McLean 309 (1838); Taylor v. Snyder, 3 Den. 145 (1846); Pierce v. Whitney, 29 Me. 188 (1848). And if dated in one place, parol evidence may show another place of payment to have been intended, Thompson v. Ketchum, 4 Johns. 285 (1809).

absence of other proof of residence, it may be used as evidence of the place where the note is payable and demand should be made there.¹ To send notice of dishonor there, however, for the maker or drawer is a want of due diligence, if he resides elsewhere,² and his actual residence can be ascertained by reasonable diligence.³

The law of the place where the contract is made, in general governs its construction and determines its legality. This is true not only where no place of date is expressed,⁴ but also where there is an expressed date which differs from the place of delivery.⁵ In the latter case the place of delivery governs. So, too, where there is no place named in the date.⁶ The place named in the date is *prima facie* evidence of the place where the note was made and of the place where it was indorsed.⁷ In the absence of place of date and of other evidence of place of delivery, the maker's residence is *prima facie* the place of delivery.⁸ So, too, the indorser's

¹ Parsons 442, 458; Moodie v. Morrall, 1 Mills 367 (S. C. 1817).

² Parsons 453, 458; 1 Edwards § 175; Fisher v. Evans, 5 Binn. 541 (1813); Burrows v. Hannegan, 1 McLean 309 (1838). But see, *contra*, Hepburn v. Toledans, 5 Mart. 316 (La. 1822). See also, Mann v. Moors, Ry. & Mood. 246 (1825). And such notice is sufficient if he have a house there, although he may have another house elsewhere in the country, Stewart v. Eden, 2 Cai. 121 (1804). So, if he is thought to reside elsewhere but his residence cannot be ascertained after due diligence, Chapman v. Lipscombe, 1 Johns. 294 (1806). But if dated in New York and maker known to have removed to another place known to the holder, demand in New York is insufficient, Anderson v. Drake, 14 Johns. 114 (1817).

³ Foard v. Johnson, 2 Ala. 565 (1841); Hill v. Varrell, 3 Me. 233 (1825); Mason v. Pritchard, 9 Heisk. 793 (1872); Nailor v. Bowie, 3 Md. 251 (1852); Sprague v. Tyson, 44 Ala. 338 (1870).

⁴ Evans v. Anderson, 78 Ill. 558 (1875).

⁵ Hart v. Wills, 52 Iowa 56 (1879); Second Nat. Bank v. Smoot, 2 MacArth. 371 (1876); Overton v. Bolton, 9 Heisk. 762 (1872). And in Lennig v. Ralston, 23 Penna. St. 137 (1854), a bill of exchange, drawn and dated at Philadelphia with the intention of making it a Pennsylvania contract, was held to be governed by the laws of Pennsylvania, although sent to London with the day and year of date left blank and filled there. But, as we have seen, a note dated at Boston cannot be shown by parol evidence against a *bona fide* holder for value to have been delivered in New York, where it would be void for usury, Towne v. Rice, 122 Mass. 67 (1877).

⁶ Hyde v. Goodnow, 3 N. Y. 266 (1850).

⁷ See Hall v. Harris, 16 Ind. 180 (1861), as to making; Patterson v. Carrell, 60 Ind. 128 (1877), as to making and indorsement. But it will not be presumed from the words "Berne, June 18th, 1856," at the end of a note that it was executed in a foreign country, Farnhi v. Ramsee, 19 Ind. 400 (1862).

⁸ Harmon v. Wilson, 1 Duv. 322 (1864).

residence is presumed to be the place of an undated indorsement.¹ And in the absence of other evidence the place where the action was brought was held to be *prima facie* the place of delivery.² Such presumption, however, is not made when its result would be to make the contract illegal and void by statute.³

§ 82. **Date of Indorsement.**—What has been said of the date of bills, notes and checks applies in general also to the contracts of indorsement and acceptance. The expression of a date is not necessary at common law to an indorsement.⁴ And it is not usual to express such date either in England or in the United States. It is, however, usual in most foreign countries and in many is required by statute.⁵ In the United

¹Simpson v. White, 40 N. H. 540 (1860).

²Indianapolis Piano Mfg. Co. v. Caven, 53 Ind. 258 (1876). And this presumption was strengthened in the case of an indorser by the addition to his signature of the words "La Porte; Ind.," Rose v. Thames Bank, 15 Ind. 292 (1860).

³American Ins. Co. v. Woodruff, 34 Mich. 6 (1876); American Ins. Co. v. Cutler, 36 Ib 261 (1877). But dating a note in Georgia is no evasion of the usury law of North Carolina, where it was signed by one of the parties, if the note was given for a loan made in Georgia to a citizen of that State and lawful there, Davis v. Coleman, 7 Ired. 424 (1847).

⁴Sanger v. Sumner, 13 Ark. 280 (1853).

⁵It is required by statute that all indorsements should be dated in *Belgium* (see Code Napoleon); *Brazil* (Code Com. 1850 Art. 361); *Chili* (Code Com. 1865 Art. 658, although a blank indorsement without date implies a consideration and is sufficient to effect a transfer, Art. 661); *Colombia* (Code Com. 1853 Art. 424); *Costa Rica* (Code Com. 1853 Art. 414); *France* (Code Napoleon 1807 § 137); *Greece* (see Code Napoleon); *Haiti* (Law of 1826 taken from Code Napoleon); *Hungary* (Exch. Law 1860 ch. 1 § 30); *San Domingo* (Code Napoleon since 1844); *Ecuador* (Spanish Code since 1829); *Mexico* (Code Com. 1854 Art. 360); *Nicaragua* (Code Com. 1869 Art. 261); *Portugal* (Code Com. 1833 Art. 355); *Russia* (Exch. Law 1832 Art. 559); *Salvador* (Code Com. 1855 Art. 421); *Switzerland* (Geneva, Code Napoleon); *Spain* (Code Com. 1829 Art. 467); *Turkey* (Code Com. 1850 Art. 94); *Uruguay* (Code Com. 1865 Art. 822); *Venezuela* (Code Com. 1862 Art. 34). The French ordinance of 1673 also required an indorsement to be dated (Bedarride, vol. 1 p. 452); and without date it amounted only to a power to collect and not a transfer (*Ib.*; Pothier, Contr. de Change 40). In *Holland* an indorsement cannot be ante-dated (Com. Code 1838 Art. 138). In *Italy* a date does not vitiate the indorsement (Code Com. 1865 Art. 223). In *Zurich* the omission of a date is at the indorser's risk (Law 1805 § 23). In *Germany and Austria* a date is unnecessary (Thöl W. R. 436).

Where an indorsement is ante-dated, the indorser is liable for damages and further, in case of fraud, to punishment as for forgery in *Spain* (Code Com. 1829 Art. 470); *Colombia* (Code Com. 1853 Art. 427); *Costa Rica* (Code Com. 1853 Art. 417); *Holland* (Exch. Law 1838 Art. 138); *Ecuador* (Law of 1829, same as Spain); *Peru* (Code Com. 1853 Art. 428); *Salvador* (Code Com. 1855 Art. 424). So, as to all false dating of an indorsement in *Mexico* (Code

States the date of an indorsement has even been held so immaterial a part that its alteration does not affect the rights of the indorsee.¹ The date of an indorsement, like that of a note, is *prima facie* evidence of the time of making it, but circumstances may throw the burden of proof on the holder.² If the indorsement is not dated, the date of the note is *prima facie* that of the indorsement also.³ Other cases limit this presumption so as to imply only that the indorsement was made before maturity.⁴

In all such cases of an undated indorsement evidence is admissible to prove the real date.⁵ And the presumption of indorsement before maturity is not rebutted by evidence merely of the payee's declarations to the contrary.⁶ But where one holds without any indorsement and was not known as the holder until after the maturity of the paper and when the paper at its maturity was in other hands, the presump-

Com. 1854 Art. 363). Ante-dating of indorsements is also forbidden under penalty of forgery by the Code Napoleon (§ 139), which is applicable to *France, Belgium, Greece, Hayti, San Domingo, the Canton of Geneva and Turkey* (Code Com. 1850 Art. 96). It is also forbidden, and if done with fraudulent purpose, renders the indorser liable to a penalty and for damages in *Portugal* (Code Com. 1833 Art. 359), and *Russia* (Exch. Law 1832 Art. 563).

¹Griffith v. Cox, 1 Overton 210 (1806).

²1 Greenl. Ev. § 560; Smith v. Ferry, 69 Mo. 142 (1878); Baker v. Arnold, 3 Caines 279 (1805).

³Smith v. Nevlin, 89 Ill. 193 (1878); Canal Bank v. Templeton, 20 La. An. 141 (1868); Collins v. Gilbert, 4 Otto 753 (1876); Gray v. Brown, 49 Me. 544 (1861); Meadows v. Cozart, 76 N. C. 450 (1877); Noxon v. De Wolf, 10 Gray 343 (1858); Benthall v. Judkins, 13 Metc. 265 (1847); National Pemberton Bank v. Lougee, 108 Mass. 373 (1871); Patterson v. Carrell, 60 Ind. 128 (1877); White v. Weaver, 41 Ill. 409 (1866); Stewart v. Smith, 28 Ib. 397 (1862). And in Arkansas an assignee under a blank assignment can assume the date most advantageous to himself, Weaver v. Caldwell, 9 Ark. 344 (1849).

⁴1 Parsons 380; Balch v. Onion, 4 Cush. 559 (1849); Ranger v. Cary, 1 Metc. 369 (1840); Sullivan v. Violet, 6 Gill 181 (1847); Rahm v. Bridge Company, 16 Kans. 530 (1876); Rea v. Owens, 37 Iowa 262 (1873); Mobley v. Ryan, 14 Ill. 51 (1852); Rhode v. Alley, 27 Tex. 443 (1864); Smith v. Turney, 32 Ib. 143 (1869).

⁵Anderson v. Weston, 6 Bing. N. C. 296 (1840); Gray v. Brown, 49 Me. 544 (1861); Clendenin v. Southerland, 31 Ark. 20 (1876); Trieber v. Commercial Bank, Ib. 128; Hutchinson v. Moody, 18 Me. 393 (1841); Baker v. Arnold, 3 Caines 279 (1805); Mobley v. Ryan, 14 Ill. 51 (1852). But it has been held in Massachusetts that this presumption is not overcome by proof that the note was delivered to the indorsee before and indorsed after its dishonor, Ranger v. Cary, 1 Metc. 369 (1840).

⁶Hearson v. Grandine, 87 Ill. 115 (1877).

tion is that the transfer was made after maturity.¹ An indorsement by a third person other than the payee has the same presumption in its favor,² which in like manner is liable to be rebutted by other evidence.³

§ 83. **Date of Acceptance.**—The acceptance is more usually dated and should always be so. But this is immaterial except where the bill is made payable a given time after sight or after acceptance.⁴ In such case the running of the time of payment is reckoned from the date of the acceptance and not from the time of presentment.⁵ The date of an acceptance is presumptively the time when it was made.⁶ If there be no express date, the bill must be presumed to have been accepted on its date;⁷ or, at least, before its maturity.⁸ And evidence is, of course, admissible either in support or rebuttal of the presumption to show the actual time of acceptance.⁹

§ 84. **Alteration—Misdescription.**—An alteration of the date, as of any other material part of the instrument, avoids it.¹⁰ This is true, although such alteration may have no effect

¹Allison v. Hubbell, 17 Ind. 559 (1861). So, where there was a blank indorsement but payee was shown to be in possession of the note at its maturity, Hutchinson v. Moody, *supra*.

²Good v. Martin, 5 Otto 90 (1877); Gilpin v. Marley, 4 Houst. 284 (1871); Sullivan v. Violet, 6 Gill 181 (1847); Colburn v. Averill, 30 Me. 310 (1849); Lowell v. Gage, 38 Ib. 35 (1854).

³Freeman v. Ellison, 37 Mich. 459 (1877).

⁴1 Parsons 282. And if a written date appear, though in a different handwriting, it is presumptively the acceptor's act, Glossop v. Jacob, 4 Campb. 227 (1815).

⁵1 Parsons 291; Mitchell v. Degrand, 1 Mason 176 (1817).

⁶2 Parsons 488; Glossop v. Jacob, *supra*.

⁷2 Parsons 488 n.

⁸1 Parsons 289; Roberts v. Bethell, 12 C. B. 778 (1852).

⁹2 Parsons 489.

¹⁰1 Edwards § 172; 2 Parsons 550; Bathe v. Taylor, 15 East 412; Heffner v. Wenrich, 32 Penna. St. 423 (1859); Stephens v. Graham, 7 S. & R. 505 (1822); Hamilton v. Wood, 70 Ind. 306 (1880); Lemay v. Williams, 32 Ark. 166 (1877); Mitchell v. Ringgold, 3 Harr. & J. 159 (1810); Lewis v. Cramer, 3 Md. 265 (1852); Owings v. Arnot, 33 Mo. 406 (1863). And this is true even in the case of a *bona fide* holder, and if made after indorsement, it will discharge the indorser, Lisle v. Rogers, 13 B. Mon. 528 (1857). But an alteration by maker's agent under a mistaken view of his authority before delivery to a holder for value will not avoid the note, Van Brunt v. Eoff, 35 Barb. 501 (1861). In England the alteration of the date of an acceptance

in changing the time of maturity.¹ More especially, where the time of maturity is thereby altered, an acceptor will be discharged by such alteration.² Such alteration also amounts to a discharge of the surety upon such paper.³ And even the correction of a mistake in the day and year of date will discharge the surety.⁴ But an alteration of such mistake before delivery by the agent of both drawer and acceptor will not avail either of them as ground of discharge.⁵

In general the date of a bill, note or check need not be averred in the pleading. It is sufficient to aver that A. B. made his certain note on, &c.⁶ And the same is true as to the date of an indorsement.⁷ And proof of a note of different date from that averred in the pleadings is not a variance.⁸ When, however, the note is misdescribed as to date in the pleadings, this should be explained.⁹ And it seems that misdescription of date in an affidavit to hold to bail is material;¹⁰ but not in an agreement or mortgage referring to the instrument, if its identity is not thereby left in doubt;¹¹ nor even

should be pleaded specially, unless it be such an alteration as would render a new stamp necessary, *Parry v. Nicholson*, 13 M. & W. 778.

¹*Stephens v. Graham*, 7 S. & R. 505 (1822).

²*Hirschman v. Budd*, L. R. 8 Ex. 171 (1873); *Masters v. Miller*, 4 T. R. 320.

³*Wood v. Steele*, 6 Wall. 80 (1867); *Britton v. Diercker*, 46 Mo. 591 (1870). Not so, however, an alteration made before delivery and authorized by the surety, *Prather v. Zulauf*, 38 Ind. 155 (1871).

⁴*Miller v. Gilleland*, 19 Penna. St. 119 (1852).

⁵*Brutt v. Picard*, Ry. & Mood. 37 (1824). So, too, where the alteration was supposed by the agent to be within his authority, but was not a mere correction of mistake, *Van Brunt v. Eoff*, 35 Barb. 501 (1861).

⁶*Robinson v. Grandy*, 50 Vt. 122 (1877). But where the averment was that a note, which had no date and was payable "nine months after date," was made at a time less than nine months before commencement of suit, it was fatal, *Seldonridge v. Connable*, 32 Ind. 375 (1869).

⁷*Caldwell v. Lawrence*, 84 Ill. 161 (1876).

⁸*Byles* 80; 1 *Daniel* 94; 2 *Parsons* 474; *Coxon v. Lyon*, 2 Campb. 307 n.; *Smith v. Lord*, 2 Dowl. & L. 759. But it is said by Mr. Byles (*supra*) that this "would be otherwise if the declaration went on to describe the instrument as bearing date on a particular day."

⁹1 *Daniel* 94; 2 *Parsons* 474. And in *Tobler v. Stubblefield*, 32 Tex. 188 (1869), such misdescription of date was held to be sufficient ground for setting aside a judgment by default.

¹⁰*Chitty* 615; *Jadis v. Williams*, 5 L. J. K. B. 136.

¹¹*Byles* 80; *Way v. Hearne*, 32 L. J. 34; *Dean v. De Lezardi*, 24 Miss. 424 (1852). So, even a mistake of the time of maturity in an acceptance, the bill being dated September 8th, 1856, and payable four months after date,

in a notice of dishonor, if such misdescription causes no uncertainty.¹

§ 85. **Limitation Affected by Date.**—Where a bill or note is payable on demand, the statute of limitations runs from the date of the instrument and not from demand of payment.² When, however, the instrument is ante-dated, it takes effect, as we have seen, from its delivery only, and the statute of limitations runs from that time and not from its date.³ But where a note is made payable six months after date and post-dated in 1841, although actually made and delivered in 1840, the time of maturity, as we have already seen, is reckoned by relation to the date expressed (1841), and the statute of limitations began to run from such maturity.⁴

but accepted "due December 11th, 1856," instead of January, 1857, *Fanshawe v. Peet*, 2 H. & N. 1 (1857).

¹1 *Parsons* 476; *Mills v. Bank of U. S.*, 11 Wheat. 431 (1826); *Ross v. Planters' Bank*, 5 Humph. 335 (1844); *Saltmarsh v. Tuthill*, 13 Ala. 390 (1848). So, a notice of protest dated by mistake on a day later, but actually served on the day of the note's maturity, cannot mislead, and although it amounts to a misdescription of the note, is immaterial, *Tobey v. Lennig*, 14 Penna. St. 483 (1850).

²1 *Parsons* 38, 375; 2 *Ib.* 643; *Newman v. Kettelle*, 13 Pick. 418 (1832); *Caldwell v. Rodman*, 5 Jones 139 (1857); *Kingsbury v. Butler*, 4 Vt. 458 (1832); *Larason v. Lambert*, 7 Halst. 247 (1831); *Ruff v. Bull*, 7 Harr. & J. 14 (1825); *Easton v. McAllister*, 1 Mo. 662 (1826); *Wilks v. Robinson*, 3 Rich. 182 (1832); *Woodward v. Drennan*, 3 Brev. 189 (1815). But bank notes are an exception to this rule, *Greer v. Perkins*, 5 Humph. 588 (1845); *Farmers' and Mechanics' Bank v. White*, 2 Sneed 482 (Tenn. 1858); *Wright v. Douglass*, 3 Barb. 554 (1848).

³*Raeffe v. Moore*, 58 Ga. 94 (1877). In this case the note was made payable one day after date and dated July 1st, but actually made and delivered in August.

⁴*Bumpass v. Timms*, 3 Sneed 459 (1856).

CHAPTER IV.

FORM—THE CONTRACT FOR PAYMENT.

I. Its Positive Character.

II. Its Unconditional Character.

III. Its Limited Character.

IV. Its Certainty.

A. Certainty as to Amount.

B. Certainty as to Time of Payment.

C. Certainty as to Place of Payment.

I. ITS POSITIVE CHARACTER.

86. Language of Contract.

87. Necessary Promise or Order.

88. Acknowledgments—Due-bills.

89. Certificates of Deposit or Receipt.

90. What Words Imply a Promise.

91. Municipal Warrants—Coupons.

§ 86. **Language of Contract.**—No forms of contract are better known, nor in general simpler or briefer, than the ordinary form of promissory note, bill of exchange or draft, and check. No particular form of words is necessary to constitute such instrument.¹ Thus, a note may be in the form commonly used for a bond;² or, under some circumstances, for a bill of exchange.³ So, an order for payment indorsed on a bond or note or on a statement of account has been held to be equivalent to a bill of exchange.⁴

¹ Byles 78; Chitty 148; 1 Daniel 82; 1 Edwards § 134; 1 Parsons 23; Story on Bills § 33; Story on Prom. Notes § 12; *Morris v. Lea*, *Ld. Raym.* 1396; *S. C.*, 1 *Stra.* 629; *Brooks v. Elkins*, 2 *M. & W.* 74; *Peto v. Reynolds*, 9 *Exch.* 410; *S. C.*, 11 *Jb.* 418; *Hitchcock v. Cloutier*, 7 *Vt.* 22 (1835); *Partridge v. Davis*, 20 *Vt.* 499 (1848); *Smith v. Bridges*, 1 *Ill.* 18 (1819). And this is expressly provided in the Civil Code of Lower Canada 1867 § 2344.

² *Woodward v. Genet*, 2 *Hilt.* 526 (1858); *Bank of Louisiana v. Williams*, 21 *La. An.* 121 (1869); *Hitchcock v. Cloutier*, 7 *Vt.* 22 (1835).

³ Byles 93; Chitty 151; *Edis v. Bury*, 6 *B. & C.* 433; 9 *D. & R.* 492; *Edwards v. Dick*, 4 *B. & Ald.* 212; *Lloyd v. Oliver*, 18 *Q. B.* 471; *Allen v. Mawson*, 4 *Campb.* 115.

⁴ 1 *Daniel* 82; *Leonard v. Mason*, 1 *Wend.* 522 (1828); but not a negotiable bill, *Hoyt v. Lynch*, 2 *Sandf.* 328 (1849). But in *Platzer v. Norris*, 38 *Tex.* 1 (1873), such instrument was held not to be a bill of exchange for want of

Irrespective, however, of words relating to the consideration, place of payment and transferability (to be considered elsewhere), certain phrases have been at times required by statute to make a note negotiable in the fullest commercial sense. Such a requirement is that which limited negotiability to notes containing the words "without defalcation or discount."¹ So, the statute requiring notes given for a patent to express that fact on their face by the words "given for a patent right"² And in some foreign states bills of exchange must be designated as such in plain words;³ while in Germany the

the name of a payee. An order of this sort is not the less a bill of exchange because referring to, instead of indorsed on, a note, *e. g.* an order to pay C. or bearer \$400 "and take up A.'s note for that amount," *Cook v. Satterlee*, 6 Cow. 108 (1826). But an order for payment of demurrage indorsed on a bill of lading will not render it negotiable, *Falkenburg v. Clark*, 11 R. I. 278 (1876).

¹In *Missouri* the words "negotiable and payable without defalcation or discount," were formerly necessary to a negotiable note (1835 R. C. 298 § 7). But they are no longer required (1865 G. S. c. 86 § 15; 1879 R. S. c. 10 § 547). See as to former requirement, *Macy v. Kendall*, 33 Mo. 164 (1862).

So, in *New Jersey* the words "without defalcation or discount" were formerly necessary to make a promissory note negotiable independent of equities (1795 Pat. Rev. p. 342 § 4). This was repealed in 1871 (P. L. p. 13).

In *Arkansas* like force was given to the words "without defalcation" until 1873 (Gould's Dig. c. 15 § 3). See, too, *Woodruff v. Webb*, 32 Ark. 612 (1877).

In *Pennsylvania* promissory notes "bearing date in the city and county of Philadelphia" and containing the words "without defalcation" or "without set-off" may be "held by the indorsees discharged from any claim of defalcation or set-off" (Act of 1797; 1872 *Purd. Dig.* p. 1173 § 1).

²In *Michigan* the words "given for a patent right" must be added on the face of notes given in purchase of patent rights and such addition subjects the note to defenses as though in the hands of the original payee (1 *Comp. L.* 1871 p. 519; 1871 *P. L.* p. 191). So, in *New York* (1877 *P. L.* p. 68). So, in *Ohio* (1880 R. S. § 3178; 1869 *P. L.* p. 93 § 1). This act has been held not to apply to a non-negotiable note, *State v. Brower*, 30 *Ohio St.* 101 (1876); or to a note given for a patented machine, *State v. Peck*, 25 *Ib.* 26 (1874). So, in *Pennsylvania* (1872 *P. L.* p. 60 §§ 1, 2; *Purd. Dig.* p. 1173 § 3). *Indiana*, *Nebraska* and *Vermont* have similar acts. The *Indiana* statute has been held unconstitutional, *Helm v. First Nat. Bank*, 43 *Ind.* 167 (1873). But the contrary has been held in *Pennsylvania*, *Haskell v. Jones*, 86 *Penna. St.* 173 (1878); and in *Ohio*, *Tod v. Wick*, 36 *Ohio St.* 370 (1881). The omission of these words will not, however, affect the validity of the note in the hands of a *bona fide* holder, *Hunter v. Henninger*, 93 *Penna. St.* 373 (1880); *Haskell v. Jones*, 86 *Penna. St.* 173 (1878); *Hereth v. Meyer*, 33 *Ind.* 511 (1870); *Moses v. Comstock*, 4 *Neb.* 516 (1876); *Pindar v. Kelley*, 48 *Vt.* 27 (1875); *Streit v. Waugh*, *Ib.* 298 (1876). And the words "given for a patent right" do not destroy the presumption of good faith in the purchaser, *Goddard v. Lyman*, 14 *Pick.* 268 (1833); *Hereth v. Merchants' Nat. Bank*, 34 *Ind.* 380 (1870).

³This is the case as to drafts in *Bolivia* (*Com. Code* 1834 Art. 463); *Spain* (*Com. Code* 1829 Art. 563); *Peru* (*Cod. Com.* 1853 Art. 522); *Colombia* (*Com.*

word "Wechsel" (exchange) or its equivalent in a foreign language is indispensable to both bill and notes.¹ In Hungary, moreover, there is a curious provision as to form, which makes everything "in Hebrew letters" invalid in such instruments.²

§ 87. **Necessary Promise or Order.**—Whatever may be the language or form of words used, a contract for the payment of money is essential to the character of commercial paper. In a note this contract takes the form of a promise to pay. In a bill or draft it takes the form of a request or order to pay.³ But the word "pay" is not indispensable. Thus a promise "to pay or cause to be paid" has been held to be a sufficient promissory note;⁴ so, "to account," "to be accountable for;"⁵ so, without further words of promise, "good to A. B. or order for \$30;"⁶ or, "good to bearer" written under an account in which the amount was stated;⁷ so, "I guaranty to pay."⁸

Code 1853 Art. 517); *Costa Rica* (Com. Code 1853 Art. 510); and *Ecuador* (same as Spain); as to bills and notes in *Russia* (Law of 1832 Art. 541); and *Salvador* (Com. Code 1855 Art. 510); as to bills of exchange only in *Sweden and Norway* (Exch. Law 1851 c. 1 § 1); and *Switzerland* (Zurich 1805 § 1; Berne 1859 § 3; Basle 1863 § 3).

¹Thöl W. R. 146; Germ. Exch. Law 1848 Arts. 4, 96. This requirement was adopted also in *Austria* (Exch. L. 1850 Arts. 4, 96), and in *Hungary* (Exch. Law 1860 c. 1 § 14).

²Hungarian Exch. Law 1860 c. 1 § 14; Law of 1844 § 2.

³Byles 82; 1 Daniel 40; 1 Parsons 42; Story on Prom. Notes § 19 n. 3. But where by mistake or fraud the instrument read, "Borrowed of I. S. £50 which I promise *never* to pay," recovery was had as on a proper promise, Anon., 2 Atk. 32; Chitty 151.

⁴Lovell v. Hill, 6 C. & P. 238 (1833); or simply an acknowledgment of debt "to be paid," Casborne v. Dutton, Sel. N. P. 381. So, too, without any word of promise the following instrument has been held to be a promissory note: "For value received of A. B. or order \$30 *on demand* and interest annually," Cummings v. Gassett, 19 Vt. 308 (1847).

⁵Morris v. Lea, Ld. Raym. 1396; S. C., 1 Stra. 629; see, too, Furber v. Caverly, 42 N. H. 74 (1860), where an indorsement of "A. B. accountable" was held to be a sufficient contract of guaranty. So, Bagley v. Buzzell, 19 Me. 88 (1841). But, *contra*, under stamp act, a mere receipt for £20, "which I borrowed of you and I have to be accountable for the said sum," Horne v. Redfearn, 4 Bing. N. C. 493 (1838).

⁶Franklin v. March, 6 N. H. 364 (1833). And see Weston v. Myers, 33 Ill. 424 (1861), where no payee was named, but the holder was allowed to add his own name as payee. But the contrary was held, for want of a payee, in Brown v. Gilman, 13 Mass. 158 (1816).

⁷Hussey v. Winslow, 59 Me. 170 (1870).

⁸Ketchell v. Burns, 24 Wend. 456 (1840); Lequeer v. Prosser, 1 Hill 256 (1841); Bruce v. Westcott, 3 Barb. 374 (1848); Partridge v. Davis, 20 Vt. 499 (1848). Not so, however, a guaranty of another note written on a separate paper, Weed v. Clark, 4 Sandf. 31 (1850).

And even the words "I have borrowed" have been held to imply a promise of payment;¹ or the indorsement "holden."² In like manner an order to "let the bearer have \$50" constitutes a valid bill of exchange.³ So, too, an order to "credit A. in cash."⁴ And all mistakes of expression are immaterial, which merely substitute a past for a present tense, *e. g.* "I promist;"⁵ or use the pronoun "I" for several joint makers;⁶ or the pronoun "we" for a sole maker.⁷ So, too, "we or either of us promise" has been held to constitute a good joint and several note.⁸

The expressions "please," "and oblige," &c., do not detract

¹ Harrow v. Dugan, 6 Dana 341 (1838); Woodfolk v. Leslie, 2 Nott & McC. 585. So, too, the following has been held to be a good note: "A. B. borrowed of C. D. £14 as per loan in promise of payment of which I am truly thankful for and shall never be forgotten by me, J. M. your affectionate brother, £14," Ellis v. Mason, 1 Eng. Jur. 380, cited 2 Hill 295 *n.* But see, Horne v. Redfearn, 4 Bing. N. C. 433. And in Hyne v. Dewdney, 21 L. J. Q. B. 278 (1852), Lord Campbell, C. J., said of a paper in these words, "Borrowed of A. B. £100 for one or two months," that there was "no binding contract * * * nothing more than a simple acknowledgment of the money having been paid."

² Bean v. Arnold, 16 Me. 251 (1839).

³ Biesenthal v. Williams, 1 Duv. 329 (1864). But see, *contra*, Little v. Slackford, 1 Mood. & M. 171 (1828).

⁴ Ellison v. Collingridge, 9 C. B. 570 (1850); Allen v. Sea, F. & L. Ass. Co., *Id.* 574. But an order to "credit A. or bearer \$30, and I will pay you," is not a sufficient bill of exchange, Woolley v. Sergeant, 3 Halst. 262 (1826).

⁵ Bland v. People, 4 Ill. 364 (1842); and "I promised," &c., has been held to be a sufficient negotiable note to support an indictment for the forgery of a note, Perkins' Case, 7 Gratt. 651 (1851).

⁶ Lequeer v. Prosser, 1 Hill N. Y. 256; Hemmenway v. Stone, 7 Mass. 58; Wallace v. Jewell, 21 Ohio St. 163 (1871); Ely v. Clute, 19 Hun 35 (1879); Holman v. Gilliam, 6 Rand. 39 (1827); Maiden v. Webster, 30 Ind. 317 (1868); Harrow v. Dugan, 6 Dana 341 (1838); Ladd v. Baker, 26 N. H. 76 (1852); Humphreys v. Guillow, 13 N. H. 387; Eddy v. Bond, 19 Me. 461 (1841); Barnett v. Skinner, 2 Bailey 88 (1831); Hopkins v. Lane, 4 T. & C. 311 (1874); Lane v. Salter, 4 Roberts. 239 (N. Y. 1866); Higerty v. Higerty, 1 Phila. 232 (1851); Kinsely v. Shenberger, 7 Watts 193; Karcz v. Avinger, 3 Hill 215 (So. Car. 1837); Monget v. Penny, 7 La. An. 134 (1852); Groves v. Stephenson, 5 Blackf. 584 (1841); Monson v. Drakeley, 40 Conn. 552 (1873); Dederick v. Barber, 44 Mich. 19 (1880); Dill v. White, 52 Wis. 456 (1881). It has, however, been held not to be *prima facie* a joint note, where one signed at the right hand with a seal and the other to the left with the word "witness" printed above his name, Steininger v. Hoch, 39 Penna. St. 263 (1861); Hopkins v. Lane, 4 T. & C. 311 (1874). But see, *contra*, Keller's Admr. v. McMuffman, 15 W. Va. 64 (1879), which only differed from Steininger v. Hoch, *supra*, in using the word "security" instead of "witness."

⁷ Whitmore v. Nickerson, 125 Mass. 496 (1878); Rice v. Gove, 22 Pick. 158; Holmes v. Sinclair, 19 Ill. 71 (1857); Dickerson v. Burke, 25 Ga. 225 (1858).

⁸ Pogue v. Clark, 25 Ill. 333 (1861).

from the commercial character of an instrument. Thus, Lord Kenyon held an instrument to be a bill of exchange, which read: "Mr. N. will much oblige Mr. W. by paying," &c.¹ But a mere request to do a favor to the drawer is not a bill of exchange, *e. g.* "please let the bearer have £7 and place it to my account and you will much oblige your humble servant;"² or, "please take up my note payable to S. for \$200 and it will be all right as we talked;"³ or, "please pay my wages as fast as they become due to the amount of \$150."⁴ So, "I allow to give" has been held to express a mere intention and no sufficient promise.⁵

§ 88. **Acknowledgments—Due-bills.**—A mere *acknowledgment* of indebtedness is not, in general, sufficient to constitute either a bill or note;⁶ although such acknowledgment has been held a sufficient promise to take a case out of the statute of limitations in Georgia.⁷ And in Alabama an acknowledgment of a sum due setting out the consideration for which it was given has been held to be a promissory note.⁸ And some of the United States have by statute extended the character and law of promissory notes to all instruments in writing "whereby any person acknowledges any sum of money to be due to any other person."⁹

¹ *Ruff v. Webb*, 1 Esp. 129 (1794). See, too, *Russell v. Powell*, 14 M. & W. 418. And see, *Biesenthal v. Williams*, 1 Duv. 329 (1864). But "we authorize you to pay A. B. or order" is not sufficient to make a bill of exchange, *Hamilton v. Spottiswoode*, 4 Exch. 200 (1849).

² *Little v. Slackford*, 1 Mood. & M. 171 (1828).

³ *Gillilan v. Myers*, 31 Ill. 525 (1863).

⁴ *Knowlton v. Cooley*, 102 Mass. 233 (1869).

⁵ *Harmon v. James*, 7 Ind. 263 (1855).

⁶ *Byles* 28; *Chitty* 150; 1 *Daniel* 42; 1 *Parsons* 25; *Story on Prom. Notes* § 14; *Sears v. Trustees Wesl. Univ.*, 23 Ill. 183 (1862); *New Orleans v. Straus*, 25 La. An. 50 (1875); *Carson v. Lucas*, 13 B. Mon. 213 (1852). And this is clearly the case where a memorandum ("I owe the estate of A. B. \$150") was given merely as a statement without intention of making a note of it, *Bowles v. Lambert*, 54 Ill. 237 (1870).

⁷ *Brewer v. Brewer*, 6 Ga. 588 (1849).

⁸ *Fleming v. Burge*, 6 Ala. 373 (1844). See, too, *Blood v. Northrup*, 1 Kans. 28; *Finney v. Shirley*, 7 Mo. 42.

⁹ This statute appears to have originated in *Illinois* (1845 R. S. 384; 1880 R. S., Hurd's Ed., c. 98 §§ 3-7). It has been enacted also in *Colorado* (1877 G. L. 110 § 90); *Idaho* (1875 R. L. 648 §§ 1-4); *Indiana* (1 R. S., Davis' Ed., 1876 c. 177 §§ 1-4; also vol. 2 p. 35 § 6); *Iowa* (1880 Rev. Code § 2085); and

But in the absence of special statutes and of words indicating a promise of payment, a mere *due-bill* or I. O. U. is not regarded as a promissory note in England.¹ And this is also the rule in some of the United States at least.² In other States a due-bill, acknowledging a sum of money to be due A. B. "or bearer," has been held to be a sufficient promissory note;³ especially where the sum due is referred to as "borrowed," "amount of bill rendered," &c.⁴

§ 89. **Certificates of Deposit or Receipt.**—In like manner a banker's *certificate of deposit*, although not expressly providing for payment on return of the certificate, has been held to imply such promise and to be equivalent, therefore, to a promissory note;⁵ even within the meaning of the banking

Mississippi (1871 Rev. Code § 2227; 1880 Rev. Code § 1123). But in *Illinois* the following is not a negotiable note—"Cartage Ticket, 50 cents, Hubbard, Spencer & Co.," *Hubbard v. Holloway*, 13 Bradw. 101 (1883).

¹ *Bytes* 29; *Chitty* 150; *Fesenmayer v. Adecock*, 16 M. & W. 449 (1847); *Melanotte v. Teasdale*, 13 *Ib.* 216 (1844); *Smith v. Smith*, 1 F. & F. 539; *Gould v. Combs*, 1 C. B. 543; *Fisher v. Leslie*, 1 Esp. 425 (1795); *Israel v. Israel*, 1 Campb. 499 (1808); *Childers v. Boulnois*, Dow. & Ry. 15 p. 8; *Beeching v. Westbrook*, 8 M. & W. 412.

² *Carson v. Lucas*, 13 B. Mon. 213 (1852); *Garland v. Scott*, 15 La. An. 143 (1860); *Currier v. Lockwood*, 40 Conn. 349 (1873); *Read v. Wheeler*, 2 Yerg. 50. (This decision, made in 1821, was overruled in 1840 in *Cummings v. Freeman*, 2 Humph. 143). See, too, *Brenzer v. Wightman*, 7 Watts & S. 264 (1844). Especially if the due-bill does not name a payee or time of payment, *Biskup v. Oberle*, 6 Mo. App. 583 (1878).

³ *Sackett v. Spencer*, 29 Barb. 180 (1859); *Russell v. Whipple*, 2 Cow. 536 (1824); *Huyck v. Meador*, 24 Ark. 191 (1866); *Wardwell v. Sterne*, 22 La. An. 28 (1870). Where, however, a due-bill was made due to "Bearer" but addressed to A. B., it was held to be a question for the jury to determine whether it was intended for a note or a mere memorandum, *Hopson v. Binnwankel*, 24 Tex. 607 (1860).

⁴ *Cummings v. Freeman*, 2 Humph. 143 (1840); *Finney v. Shirley*, 7 Mo. 42 (1841); *McGowen v. West*, *Ib.* 569 (1842); *Brady v. Chandler*, 31 *Ib.* 28 (1860); *Bacon v. Bicknell*, 17 Wis. 523 (1863); *Jacquin v. Warren*, 40 Ill. 459 (1866); *Spearing v. Zacharie*, 26 La. An. 496 (1874); *McDonagh v. Yeager*, 42 Ind. 388.

⁵ 1 *Edwards* § 486; 1 *Parsons* 26; *Richer v. Voyer*, L. R. 5 P. C. 461 (1874); *Miller v. Austen*, 13 How. 218, affirming *Austen v. Miller*, 5 McLean 153; *Bank of Orleans v. Merrill*, 2 Hill 295; *Leavitt v. Palmer*, 3 N. Y. 35; *Pardee v. Fish*, 60 N. Y. 265 (1875); *Hart v. Life Assoc.*, 54 Ala. 495 (1875); *Hunt v. Divine*, 37 Ill. 137 (1865); *Fells Point Savings Inst. v. Weedon*, 18 Md. 320 (1862); *Cate v. Patterson*, 25 Mich. 191 (1872); *Brunmagim v. Tallant*, 29 Cal. 503 (1866); *Tripp v. Curtenius*, 35 Mich. 494 (1877); *Bank of Peru v. Farnsworth*, 18 Ill. 563; *Hazleton v. Union Bank*, 32 Wis. 51 (1873); *Laughlin v. Marshall*, 19 Ill. 390; *Gregg v. Union Co. Bank*, 87 Ind. 238 (1882); *Howe v. Hartness*, 11 Ohio St. 449; *Johnson v. Barney*, 1 Iowa 531; *Bean v. Briggs*, *Ib.* 488; *Fultz v. Walters*, 2 Mont. 165 (1874); *Kilgore v. Bulkley*, 14 Conn. 362; *Poorman v. Mills*, 35 Cal. 118; *Mills v. Barney*, 22

act.¹ A mere bank *deposit book*, however, is not negotiable;² nor a *stock certificate*.³ On the other hand, a certificate of purchase of certain property for \$400, "which amount I hereby acknowledge to be unpaid and yet due," has been held in Georgia to be a good promissory note.⁴ So, too, a warehouseman's receipt made payable to bearer is negotiable.⁵

§ 90. **What Words Imply a Promise.**—In general any expression of a promise to pay will make a promissory note of what would otherwise be in form merely an acknowledgment of debt. Thus, an acknowledgment of debt "payable" to A. B. is a note.⁶ So, an acknowledgment of debt to A. B., "to be paid on demand;"⁷ or of a balance due which "I am

Ib. 240; *Welton v. Adams*, 4 *Ib.* 37; *McMillan v. Richards*, 9 *Ib.* 418. In *California* (1872 Civ. Code § 8095) and in *Dakota* (1877 Rev. Code § 1829) certificates of deposit are classified by statute as negotiable instruments; and so in *Wisconsin* (1878 R. S. §§ 1675, 1676) certificates of deposit "whereby any one shall promise to pay," &c. But a different rule has been adopted in *Pennsylvania*; *London Savings Fund Soc. v. Hagerstown Sav. Bank*, 36 Penna. St. 498 (1860); *Patterson v. Poindexter*, 6 Watts & S. 227 (1843); *Charnley v. Dulles*, 8 *Ib.* 361 (1845). So, *Lebanon Bank v. Mangan*, 28 Penna. St. 452 (1857), following *Patterson v. Poindexter*, above cited, and holding the adverse decision of *Miller v. Austen*, 13 How. 218, only authoritative in *Pennsylvania* as an expression of the law of *Ohio*.

¹ *Leavitt v. Palmer*, 3 N. Y. 35 (1849); *Bank of Peru v. Farnsworth*, 18 Ill. 563; *Hazleton v. Union Bank*, 32 Wis. 51 (1873). But it is not such a note as must by statute of New York be signed by both president and cashier of the bank making it, *Leavitt v. Palmer*, 3 N. Y. 35; *Barnes v. Ontario Bank*, 19 N. Y. 159. See, too, *Carey v. McDougald*, 7 Ga. 85 (Ga. Stat. 1837, Hotchk. 358).

² *Witte v. Vincenot*, 43 Cal. 325 (1872); *Howard v. Windham Co. Sav. Bank*, 40 Vt. 597 (1868).

³ *Mechanics' Bank v. N. Y. & N. H. R. R.*, 13 N. Y. 599. But a scrip certificate for the delivery of shares of stock to bearer has been held in England to be negotiable by the usage of bankers, and therefore to be valid in the hands of an innocent purchaser, although negotiated by a broker in fraud of his principal, the rightful owner, *Rumball v. Metropolitan Bank*, L. R. 2 Q. B. D. 194 (1877).

⁴ *Lowe v. Murphy*, 9 Ga. 338 (1851).

⁵ In *Minnesota* without indorsement, *State v. Loomis*, 27 Minn. 521 (1881); *G. S. Minn.* 1878 c. 124 § 17. In *Missouri*, however, only by indorsement, *Erie, &c., Dispatch v. St. Louis Cotton Co.*, 6 Mo. App. 172 (1878). The *Missouri* statute (Wagn. 220 §§ 6, 7) makes such receipts "negotiable by written indorsement and delivery in the same manner as bills of exchange and promissory notes." And if not transferred by indorsement, they are not negotiable, *Fourth Nat. Bank v. St. Louis Cotton Exp.*, 11 Mo. App. 333 (1882). But they are not covered by the statute relating to negotiable instrument in *Illinois*, *Canadian Bank v. McCrea*, 106 Ill. 281 (1882).

⁶ *Parsons* 25.

⁷ *Casborne v. Dutton*, Selwyn N. P. 401.

still indebted and do promise to pay.”¹ In like manner a due-bill “payable” or “to be paid” on demand or in any other specified manner is to all intents and purposes a promissory note;² or “to be paid when called for;”³ or even payable to another person than the one to whom the money is said to be due, in which case it has been held to be a good note to such other person.⁴ And even in England an “I. O. U. £20 to be paid on” &c., has been held to be a sufficient promissory note.⁵ And in the United States a certificate of deposit, “payable on return of this certificate,” is equivalent to a note;⁶ or, with the words added, “which sum the bank will pay to him or his order;”⁷ or, “payable in current bank bills;”⁸ or even, in some States, “payable in currency,” currency being in such cases held equivalent to money;⁹ but not a certificate of deposit “payable in current funds;”¹⁰ nor, in England, a certificate of deposit “to be returned on demand,” but intended merely for purposes of stock speculation.¹¹

The same reasoning is applicable to *receipts* for money con-

¹Chadwick v. Allen, 1 Stra. 706.

²Smith v. Allen, 5 Day 337 (1812); Kimball v. Huntington, 10 Wend. 675 (1833); Mitchell v. Rome R. R. Co., 17 Ga. 574 (1855); Marrigan v. Page, 4 Humph. 247 (1843); Pepoon v. Stagg, 1 Nott & McC. 102 (1818); Carver v. Hayes, 47 Me. 257 (1859); Potts v. Coal Company, 6 Phila. 249 (1867); Richmond, &c., R. R. v. Snead, 19 Gratt. 354 (1869). See, too, Ubsdell v. Cunningham, 22 Mo. 124 (1855); Corbett v. State of Georgia, 24 Ga. 287 (1858).

³Bilderback v. Burlingame, 27 Ill. 333 (1862), under the Illinois statute.

⁴Bowie v. Foster, Minor 264 (Ala. 1824).

⁵Brooks v. Elkins, 2 M. & W. 74.

⁶Miller v. Austen, 13 How. 218, affirming Austen v. Miller, 5 McLean 153; Bean v. Briggs, 1 Iowa 488; Johnson v. Baine, *Ib.* 531; Laughlin v. Marshall, 19 Ill. 390; Poorman v. Mills, 35 Cal. 118; Tripp v. Curtenius, 36 Mich. 494 (1877); Drake v. Markle, 21 Ind. 433 (1863); Carey v. McDougald, 7 Ga. 85 (1849).

⁷Carey v. McDougald, *supra*.

⁸Pardee v. Fish, 60 N. Y. 265 (1875).

⁹Klauber v. Biggerstaff, 47 Wis. 551 (1879); Hart v. Life Assoc., 54 Ala. 495 (1875); Drake v. Markle, 21 Ind. 434 (1863); Howe v. Hartness, 11 Ohio St. 449 (1860). But see, *contra*, Huse v. Hamblin, 29 Iowa 50 (1870); Ford v. Mitchell, 15 Wis. 334.

¹⁰Lindsey v. McClelland, 18 Wis. 505 (1864); Johnson v. Henderson, 76 N. C. 227 (1877).

¹¹Sibree v. Tripp, 15 M. & W. 23 (1846), Pollock, C. B., saying in this case, “it seems to me that a promissory note, whether referred to in the statute of Anne or in the text books, means something which the parties *intend* to be a promissory note.” It was, therefore, held not to require stamping as a promissory note.

taining a promise of repayment. Thus, "received of A. B. £100, which I promise to pay on demand," has been held to be a good note.¹ So, a receipt for money "to be returned when called for."² But a certificate in these words: "The bearer leaves \$100 in my hands, which sum I hold subject to his order," is not a negotiable instrument;³ much less a mere statement of receipt intended for evidence of moneys to be accounted for.⁴ Neither is a receiver's certificate of indebtedness, made by order of court to A. B. or bearer, and payable out of a particular fund, a negotiable instrument;⁵ nor, in general, a receipt for personal property (wool), although "payable in six months."⁶ But in some of the United States promises to pay personal property and acknowledgments of such property being due to another, are made negotiable notes by statute.⁷

§ 91. **Municipal Warrants—Coupons.**—Lastly, ordinary warrants, orders and certificates of indebtedness drawn by one county, township or other municipal officer on another in favor of creditors of the municipality, although they may be so far negotiable as to pass by indorsement or delivery, and be sued by the holder in his own name, "yet," in the language of Mr. Justice Dillon, "they are not commercial or negotiable paper in the hands of holders so as to exclude

¹Ashby v. Ashby, 3 Moo. & P. 186 (1829); Green v. Davies, 4 B. & C. 235 (1825).

²Woodfolk v. Leslie, 2 Nott & McC. 585 (1820).

³Roman v. Terna, 40 Tex. 306 (1874), holding such an instrument to be a non-negotiable letter of credit. But an indorsement of a note "A. B., holder," is a sufficient "assumption of liability" to hold the indorser without a demand, Bean v. Arnold, 16 Me. 251 (1839).

⁴Tomkins v. Ashby, 6 B. & C. 541 (1827), and such instrument need not be stamped as a note.

⁵Turner v. Peoria, &c., R. R., 95 Ill. 134 (1880); Union Trust Co. v. Chicago R. R., 7 Fed. Rep. 513 (1881).

⁶Martin v. Butler, Wright 553.

⁷This is the case in *Colorado* (1877 G. L. 110 § 90); *Idaho* (1875 R. L. 648 §§ 1-4); *Illinois* (1845 R. S. 384; 1880 R. S., Hurd's Ed., c. 98 §§ 3-7); *Indiana* (1876 1 R. S., Davis' Ed., c. 177 §§ 1-4; vol. 2 p. 35 § 6); *Iowa* (1880 Rev. Code § 2085), "whenever it is manifest from their terms that such was the intention of their maker, but the use of the technical words 'order' or 'bearer' alone will not manifest such intention." So, in *Wisconsin*, warehouseman's receipts are made negotiable by statute (1878 R. S. §§ 1675, 1676).

inquiry into the legality of their issue or preclude defenses thereto.”¹ This class of instruments includes also school-district warrants;² and has been extended even to a municipal promissory note given for a loan not authorized by statute.³ On the other hand, interest coupons payable to bearer are negotiable, although detached from the bond to which they belong.⁴

¹ Dillon on Mun. Corp. § 406; 1 Parsons 26; 1 Daniel 393; Knapp v. Mayor, &c., of Hoboken, 10 Vroom 394 (1877); Mayor v. Ray, 19 Wall. 468 (1873); Read v. Buffalo, 67 Barb. 526 (1877); Fairchild v. Ogdensburgh R. R., 15 N. Y. 338; Bull v. Sims, 23 *Ib.* 570; Oatman v. Taylor, 29 *Ib.* 657; Kelley v. Brooklyn, 4 Hill 263 (1843); Smith v. Cheshire, 13 Gray 318; Matthis v. Town of Cameron, 62 Mo. 504 (1876); Burlington R. R. v. Clay County, 13 Neb. 367 (1882); People v. Johnson, 100 Ill. 537 (1881); Ohio v. Treasurer of Liberty Township, 22 Ohio St. 144 (1871); Allison v. Juniata County, 50 Penna. St. 351 (1865); Emery v. Inhabitants of Mariaville, 56 Me. 315 (1868); East Union Township v. Ryan, 86 Penna. St. 459 (1878); Camp v. Knox County, 3 B. J. Lea 199 (1879); Hyde v. Franklin County, 27 Vt. 185 (1855); Taft v. Pittsford, 28 *Ib.* 286 (1856); Talty v. Freedman's Trust Co., 1 MacArthur. 522; Sturtevant v. Inhabitants of Liberty, 46 Me. 459; State v. Dubuclet, 23 La. An. 267 (1871); Second Nat. Bank v. Lansing, 1 Mich. N. P. 181 (1870); Eaton v. Berlin, 49 N. H. 219; Clark v. Polk Co., 19 Iowa 248 (1865); People v. Supervisors, 11 Cal. 170 (1858); Dana v. San Francisco, 19 *Ib.* 486 (1861); Dyer v. Covington Township, 19 Penna. St. 200 (1852); O'Donnell v. City of Phila., 2 Brewst. 481 (1868). But see, *contra*, Dalrymple v. Whittingham, 26 Vt. 345 (1854), where a warrant on the town treasurer was held to be negotiable. A U. S. militia voucher is not negotiable, Creighton v. Black, 2 Mont. 354 (1878); U. S. Rev. St. § 3477. But parish warrants have been held to be negotiable in *Louisiana*, Guilfort v. Parish of Ascension, 28 La. An. 413 (1876). And county warrants in *Illinois*, Garvin v. Wiswell, 83 Ill. 215. And in *Pennsylvania* until 1849, Craig v. Richmond District, 1 Phila. 33 (1850).

² Fox v. Shipman, 19 Mich. 218 (1869); School District v. Stough, 4 Neb. 357 (1876); State v. Huff, 63 Mo. 288 (1876).

³ Town of Hackettstown v. Swackhamer, 8 Vroom 198 (1874).

⁴ Clark v. Iowa City, 20 Wall. 583 (1874); Walnut v. Wade, 13 Otto 683 (1880); Thomson v. Lee County, 3 Wall. 327; First Nat. Bank v. Mt. Tabor, 52 Vt. 93 (1879); Thompson v. Perrine, 16 Otto 589 (1882); Haven v. Grand Junc. R. R., 109 Mass. 88 (1871); Beaver Co. v. Armstrong, 44 Penna. St. 63; Burroughs v. Commissioners of Richmond Co., 65 N. C. 234 (1871); Gelpeke v. City of Dubuque, 1 Wall. 175 (1863); Evertsen v. National Bank, 66 N. Y. 14 (1876).

II. ITS UNCONDITIONAL CHARACTER.

- 92. What is a Conditional Promise.
- 93. What are not Conditions.
- 94. The Condition must be Expressed.
- 95. Effect of Subsequent Performance.

§ 92. **What is a Conditional Promise.**—It is a rule governing all forms of commercial paper alike, that the instrument must be payable unconditionally, or, as it is often expressed, “at all events.” Otherwise, although it remain valid as a conditional contract, it must lose its force as a negotiable instrument.¹

The following instruments have been held to be *conditional* and therefore not commercially negotiable: “if I am then living;”² “provided the terms mentioned in my letter are complied with;”³ subject to a contract or policy of insur-

¹ Byles 95; Chitty 155; 1 Daniel 45; 1 Edwards § 155; 1 Parsons 42; Story on Bills § 46; Story on Prom. Notes § 21; Cook v. Satterlee, 6 Cow. 108 (1826); Carlos v. Fancourt, 5 T. R. 482; Worley v. Harrison, 3 Ad. & E. 669 (1835); Conover v. Stillwell, 5 Vroom 54 (1869); Third Nat. Bank v. Armstrong, 25 Minn. 531 (1878); Carnahan v. Pell, 4 Col. 190 (1878); Dilley v. Van Wie, 6 Wis. 209; Blaikie v. Griswold, 10 Ib. 293; Van Steenwyk v. Sackett, 17 Ib. 645; Kingsbury v. Wall, 68 Ill. 311; Smalley v. Edey, 15 Ill. 324 (1853); Overton v. Tyler, 3 Penna. St. 346 (1846); Mast v. Matthews, 30 Minn. 441 (1883); Edwards v. Ramsey, *Ib.* 91; Stevens v. Johnson, 28 *Ib.* 172 (1881); Tradesman's Nat. Bank v. Green, 57 Md. 602 (1881); Hosstatter v. Wilson, 36 Barb. 307.

In *California* negotiable instruments must be “without any condition not certain of fulfillment” (Civ. Code of 1872 § 8088); but an option to pay or perform some other act, in itself non-negotiable, does not destroy the negotiability of the instrument (*Ib.* § 8090).

In *Dakota* the above-mentioned provisions of the California Code have been copied (Rev. Code 1877 §§ 1822, 1824).

In *Tennessee* bonds with collateral conditions and bills or notes for specific articles, or for the performance of any duty, are made assignable, but not negotiable (1871 C. S. § 1967; 1801 P. L. c. 6 § 54 modified). So, the English Bills of Exchange Act 1882, 45 and 46 Vict. c. 61 § 3, requires negotiable bills to be unconditional. By recent statute of *Indiana* (1875 P. L. 4; 1 R. S. 1876 p. 149) “any and all agreements to pay attorney fees, depending upon any condition therein set forth and made part of any bill of exchange, acceptance, draft, promissory note, or other written evidence of indebtedness, are hereby declared illegal and void.” This statute applies, however, only to such agreements on a condition expressed in the instrument, *Churchman v. Martin*, 54 Ind. 380; *Brown v. Barber*, 59 *Ib.* 533; *Smock v. Ripley*, 62 *Ib.* 81; *Garver v. Pontious*, 66 *Ib.* 191.

² Chitty 157; *Braham v. Bubb*, Trin. Term 1826, Middlesex, Abbott, C. J., distinguishing this case from that of a note payable at the maker's death.

³ *Kingston v. Long*, Bayley 16, 6th Ed.; 4 Dougl. 9. And see, *Greele v. Parker*, 5 Wend. 414 (1830), where it was held that an acceptance “on the terms proposed” threw no burden on the holder of proving what the terms were, following *Read v. Wilkinson*, 2 Wash. C. C. 514.

ance;¹ “if not revoked and (the payee) continue in my employ;”² “provided he proceeds to sea;”³ “if he do his duty as an able seaman;”⁴ “provided the ship M. arrives * * * free from capture and condemnation by the British;”⁵ “provided A. B. shall not return to England or his death be duly certified before” the time of payment;⁶ “provided A. B. shall not be surrendered to prison” within a certain limited time;⁷ “providiug that a certain mortgage be paid and canceled;”⁸ on condition of the delivery of a certain deed;⁹ provided A. B. shall not pay by a certain day;¹⁰ on the death of A. B., “provided he leaves us sufficient to pay that sum, or if we otherwise shall be able to pay it;”¹¹ not to ask or expect payment “until (maker’s) old mill is sold at a fair price.”¹² So, by contemporaneous indorsement, “no demand to be made as long as the interest is paid;”¹³ or, a note for payment of interest only, unless the principal should be

¹ *Cushing v. Fifield*, 70 Me. 50 (1879); *Am. Exch. Bank v. Blanchard*, 7 Allen 333 (1863). See also, *Taylor v. Curry*, 109 Mass. 36 (1871), where the added words “on policy No. 33” were held not to affect the negotiability of the note. But a marginal memorandum “given as collateral security with agreement,” is part of a note and renders it conditional and therefore non-negotiable, *Costelo v. Crowell*, 127 Mass. 293 (1879).

² *Shaver v. West. Un. Tel. Co.*, 57 N. Y. 459 (1874).

³ *Loftus v. Clark*, 1 Hilt. 310 (1857); *James v. Hagar*, 1 Daly 517 (1865).

⁴ *Chitty* 156; *Alves v. Hodgson*, 7 T. R. 242.

⁵ *Coolidge v. Ruggles*, 15 Mass. 387 (1819). So, if made payable simply on the arrival of a certain ship, *Palmer v. Pratt*, 9 Moore 358; S. C., 2 Bing. 185; or after its arrival and discharge of coal, *Grant v. Wood*, 12 Gray 220 (1858).

⁶ *Chitty* 156; *Morgan v. Jones*, 1 Crompt. & J. 162.

⁷ *Chitty* 156; *Smith v. Boehm*, Gilb. Cas. L. & E. 93; *Beardesley v. Baldwin*, 7 Mod. 418; S. C., 2 Stra. 1151.

⁸ *Hays v. Gwin*, 19 Ind. 19 (1862).

⁹ *Kingsbury v. Wall*, 68 Ill. 311 (1873).

¹⁰ *Chitty* 156; *Appleby v. Biddulph*, cited 8 Mod. 363; 4 Vin. Abr. 240 pl. 16; *Smalley v. Edey*, 15 Ill. 324 (1853); *Baird v. Underwood*, 74 Ill. 176 (1874).

¹¹ *Roberts v. Peake*, 1 Burr. 323.

¹² *Blake v. Coleman*, 22 Wis. 415. And where a note was conditioned that a certain “farm sold by the sheriff should not be redeemed by that time,” it was held unnecessary to aver any consideration in declaring upon it, *Nichols v. Woodruff*, 8 Blackf. 493.

¹³ *Chitty* 162; *Seacord v. Burling*, 5 Den. 444 (1848). But not an indorsement stating that a note was given upon the condition mentioned in an agreement compromising a suit, where the indorsement was only made for the purpose of identification, *Brill v. Crick*, 1 M. & W. 232.

necessary for the support of the payee;¹ or "after my advances are paid;"² or if a receipt be returned;³ or "on return of this certificate and my guaranty of another note;"⁴ or on condition that the payee deliver a certain deed on delivery of the goods, for which the order, otherwise negotiable, was given.⁵ So, a note for a reaping machine, otherwise negotiable, but conditioning the title to the machine on the payment of the note;⁶ or an otherwise negotiable receipt for wheat to be held "unless taken by law from me;"⁷ or "less \$55 in the event that T. fails to deliver" certain goods;⁸ or to pay "if the same be due him from me on his and my settlement out of the last payment on houses which I am now building;"⁹ or "on account of my share of rent which will be due June 1st;"¹⁰ or "out of the fifth payment when it should be due and allowed."¹¹ So, a promise to pay £13 "and all fines according to the rule;"¹² or \$100 "and take up their note to A. B. for that amount;"¹³ or on condition of the payee paying another note of the same maker.¹⁴ So, a receipt for certain drafts payable to the maker of the receipt, "which we promise to pay to A. B."¹⁵ So, an order for the

¹ *Light v. Scott*, 88 Ill. 239 (1878). So, a note payable in four years with interest, "not to be paid annually" unless the promisor "can make it convenient," is a conditional note and not negotiable, *Humphrey v. Beckwith*, 48 Mich. 151 (1882).

² *Shackleford v. Hooker*, 54 Miss. 716 (1877).

³ *Mason v. Metcalf*, 4 Baxt. 440 (1874).

⁴ *Smilie v. Stevens*, 39 Vt. 315 (1866). But see *infra* p. 115 n. 1 for a contrary rule where it is merely payable "on the return of this certificate."

⁵ *Kingsbury v. Wall*, 68 Ill. 311.

⁶ *Third Nat. Bank v. Armstrong*, 25 Minn. 531 (1878).

⁷ *Carnahan v. Pell*, 4 Col. 190 (1878).

⁸ *Faull v. Tinsman*, 36 Penna. St. 108 (1859). So, a note for \$60 with the provision that "if \$50 be paid January 1st it shall cancel this note," *Fralick v. Norton*, 2 Mich. 130 (1851).

⁹ *Jackman v. Bowker*, 4 Metc. 235 (1842).

¹⁰ *Rice v. Porter's Admr.*, 1 Harr. 440 (N. J. 1838). So, an order to pay, "if in funds," is not a bill of exchange, *Kemble v. Lull*, 3 McLean 272 (1843).

¹¹ *Haydock v. Lynch*, 2 Ld. Raym. 1563.

¹² *Ayrey v. Fearnside*, 4 M. & W. 168.

¹³ *Cook v. Satterlee*, 6 Cow. 108 (1826).

¹⁴ *Henry v. Colman*, 5 Vt. 402 (1833). So, if a certain other note is not paid, *Grimison v. Russell*, 14 Neb. 521 (1883).

¹⁵ *Williamson v. Bennett*, 2 Campb. 417.

payment of a non-negotiable conditional note;¹ or an order for payment "according to a donation made to the parish, the same to be in accordance with a resolution of the police jury;"² or to pay in installments as a certain building should be finished;³ or on condition that a certain railroad be built to G. by February, 1871;⁴ or payable six months "after ratification of peace between the United States and the Confederate States;"⁵ or containing an option to pay or render A. B. to prison;⁶ or an election to pay a certain judgment or lose amount of money already paid;⁷ or a promise to pay "as a set-off for the sum left me in my father's will;"⁸ or to go as a set-off for a certain order and the remainder of a debt.⁹

But an agreement to pay £50 "for a cart for the use of A. B., to be paid without fail in three weeks," has been held to be rather an agreement than a note;¹⁰ as also, a note indorsed, "this note is taken for security of balances not extending further than within-named sum and is not to be in force for six months."¹¹

§ 93. **What are not Conditions.**—On the other hand the following provisions in an instrument have been held to leave it still *unconditional* and negotiable, *e. g.* "as per memorandum of agreement;"¹² "on return of this certifi-

¹ *Noyes v. Gilman*, 65 Me. 589 (1876).

² *Jenkins v. Caddo*, 7 La. An. 559 (1852).

³ *Miller v. Excelsior Stone Co.*, 1 Bradw. 273 (1878). So, too, though the contingency afterward happen, *White v. Smith*, 77 Ill. 351.

⁴ *Eldred v. Malloy*, 2 Col. 320 (1874); *Blackman v. Lehman*, 63 Ala. 547 (1879). And see *Freeman v. Matlock*, 67 Ind. 99; 9 C. L. J. 479. But a note payable in four years, taking up a note which was made payable when a certain railroad should be completed, is independent of any such condition, *Four Mile V. R. R. v. Bailey*, 18 Ohio St. 208 (1868).

⁵ *McNiach v. Ramsay*, 66 N. C. 229 (1872).

⁶ *Smith v. Boehme*, Gilb. Cas. L. & E. 93. In *California* (1872 Civ. Code § 8090) and in *Dakota* (1877 Rev. Code § 1824), however, an option to pay or perform some other act, in itself non-negotiable, does not destroy the negotiability of the instrument. And see *Dinsmore v. Duncan*, 57 N. Y. 573 (1874), cited *infra*.

⁷ *Draper v. Fletcher*, 26 Mich. 154.

⁸ *Clarke v. Percival*, 2 B. & Ad. 660.

⁹ *Chitty 157*; *Davies v. Wilkinson*, 2 Perry & D. 256.

¹⁰ *Chitty 157*; *Ellis v. Ellis*, Gow. 216.

¹¹ *Leeds v. Lancashire*, 2 Campb. 205; see, too, *Robins v. May*, 11 Ad. & E. 214.

¹² *Jury v. Barker*, El. Bl. & E. 459 (1858); and see note to this case, 96 E. C. L. R. 459; *Littlefield v. Hodge*, 6 Mich. 326 (1859).

cate;"¹ on receiving wages from a public ship and prize-money;² "provided the money is not collected in the meantime from A.;"³ "with ten per cent. interest if not paid when due;"⁴ provided the payee deliver the crop of tobacco raised by him, then he to have one-fourth of the above in hand and in addition \$3 per hundred weight for the part yet undelivered.⁵ So, in a note for insurance premium, the provision that "if not paid at maturity, the whole amount of premium on said policy shall be considered as earned and the policy be null and void so long as this remains unpaid."⁶ So, "this note to be valid as part pay for a piano bought of me at retail price."⁷ So, an agreement to "pay A.'s draft \$2,300, for stock," is an unconditional acceptance.⁸ And an agreement, recited as consideration in the note, to show property of A., from which the maker of the note can make another debt due him, is an independent agreement and does not render the note conditional.⁹ Likewise, a recital that on payment of the note the payee shall sell a certain machine to the maker of the note.¹⁰ It has also been held that an option in a promissory note reserving the right to pay it in U. S. bonds, is not a condition and does not impair the negotiability of the note.¹¹ Nor is the negotiability of a railroad

¹*Fells Point Sav. Inst. v. Weedon*, 18 Md. 320 (1862); *Frank v. Wessels*, 64 N. Y. 155 (1876), *Church, C. J.*, saying, in this case, of *Patterson v. Poin-dexter*, 6 W. & S. 227, "the intimation as to the effect of the clause requiring a return, is not authoritative and has not been followed in this State or elsewhere." So, too, *Bean v. Briggs*, 1 Iowa 488 (1855); *Drake v. Markle*, 21 Ind. 433 (1863).

²*Evans v. Underwood*, 1 Wils. 262.

³*Pemberton v. Hoosier*, 1 Kans. 108 (1862).

⁴*Houghton v. Francis*, 29 Ill. 244 (1862). But see *Third Nat. Bank v. Armstrong*, 25 Minn. 530 (1879). And a provision for adding collection fees "in case of non-payment at maturity," is a condition, *Sweeney v. Thickstun*, 77 Penna. St. 131 (1874). So, an agreement in a two-year note, that if paid in one year there should be no interest, is a condition which destroys its negotiability, *Lamb v. Story*, 45 Mich. 488 (1881).

⁵*Ring v. Foster*, 6 Ohio 279 (1834).

⁶*Kirk v. Dodge Co. Mut. Ins.*, 39 Wis. 138 (1875).

⁷And such note can be enforced if the payee refuses to take the piano, *Preston v. Whitney*, 23 Mich. 260.

⁸*Coffman v. Campbell*, 87 Ill. 98 (1877).

⁹*Plumb v. Niles*, 34 Vt. 330 (1861).

¹⁰*Hawley v. Bingham*, 6 Or. 76 (1876).

¹¹*Dinsmore v. Duncan*, 57 N. Y. 573 (1874).

company's bond affected by a provision that it may be registered and so made transferable only on the company's books.¹

§ 94. **The Condition Must be Expressed.**—All conditions, to affect the negotiability of commercial paper, must appear on its face.² And the mere words "this note is given on condition," with nothing further to show what the condition is, are wholly immaterial and may be erased without material alteration of the paper.³ Moreover the unconditional renewal of a note is free from any condition expressed in the original note.⁴ And a note is not rendered conditional by a condition not expressed in it but expressed in the mortgage given to secure it.⁵ Where a condition does not appear on the face of the instrument it is not competent to prove it by parol.⁶

§ 95. **Effect of Subsequent Performance.**—Where the negotiability of an instrument is vitiated by a contingency expressed in it, this defect is not cured by the subsequent

¹Savannah, &c., *R. R. Co. v. Lancaster*, 62 Ala. 555 (1878).

²Byles 96; *Richards v. Richards*, 2 B. & Ad. 447. And a note given for payment of a stock subscription and absolute in its terms, amounts to a waiver of the condition as to location and building of the railroad contained in the subscription, *Evansville R. R. v. Dunn*, 17 Ind. 603 (1861). From the rule requiring all conditions to appear in the instrument, it follows that a verbal condition subsequent providing for the return or cancellation of a former note cannot affect a *bona fide* holder for value, *Goddard v. Cutts*, 11 Me. 440 (1834).

³*Palmer v. Sargent*, 5 Neb. 223 (1876).

⁴*Rogers v. Boardman*, 27 Tex. 238 (1863).

⁵*Albright v. Russell*, 5 Neb. 207 (1876). But the rule is different if the note is expressly made subject to the condition contained in the mortgage, *Goodenow v. Curtis*, 33 Mich. 505 (1876). See, too, *Titlow v. Hubbard*, 63 Ind. 6 (1878). On the other hand an indorsement on a mortgage "on same condition as per note of this date," was held sufficient to give the mortgage force as a duplicate of the note, *Grinnell v. Baxter*, 17 Pick. 386 (1835). So a collateral agreement for the discontinuance of a suit is not a condition precedent to payment of the note, *Bruce v. Carter*, 72 N. Y. 616 (1878).

⁶*Cunningham v. Wardwell*, 12 Me. 466 (1835), where the maker offered to show that the note was payable only on condition of the safe arrival of a certain cargo. See, too, *Brown v. Wiley*, 20 How. 442 (1857); *McSherry v. Brooks*, 46 Md. 103 (1876); *Gliddons v. Harrison*, 59 Ala. 481 (1877); *Jones v. Shaw*, 67 Mo. 667 (1878); *Henshaw v. Dutton*, 59 *Ib.* 139 (1875); *Calhoun v. Davis*, 2 Ind. 532 (1851); *Sears v. Wright*, 24 Me. 278 (1844); *Miller v. White*, 7 Blackf. 491 (1845); *Dale v. Pope*, 4 Litt. 166 (1823); *Beard v. White*, 1 Ala. 436 (1840); *McCoy v. Moss*, 5 Porter 88 (1837); *Rice v. Ragland*, 10 Humph. 545 (1850); *Campbell v. Upshaw*, 7 *Ib.* 185 (1846); *Gazoway v. Moore*, *Harper* 401 (1824); *McClanaghan v. Hines*, 2 Strobb. 122 (1847); *Rodgers v. Rosser*, 57 Ga. 319 (1876); *Scaife v. Beall*, 43 *Ib.* 333 (1871); *Rockmore v. Davenport*, 14 Tex. 602 (1855); *McGrath v. Barnes*, 13 So. Car. 328 (1879).

happening of the contingent event.¹ But a different rule seems to have been followed in Maine, where a note, payable "if there is anything over" in a certain settlement to be made, was held to be absolute after a settlement made showing a balance.²

An action will in all cases lie upon a contingent note on proof of the happening of the contingency; even, it seems, on a note partaking somewhat of the character of a wager and made payable "when W. H. H. shall be elected President of the United States."³ And after the contingency has happened, it may be declared on as a note.⁴ And it seems that it may be declared on as a note notwithstanding the contingency in New Hampshire.⁵ The performance of the condition must, however, be shown before a recovery can be had on the instrument.⁶ What constitutes performance of the condition is a question of fact for the jury.⁷ A condition may be rejected, however, as repugnant and void. A proviso in a bill of exchange limiting the liability of the drawer is a condition of this character.⁸

¹Byles 97; *Hill v. Halford*, 2 B. & P. 413; *White v. Smith*, 77 Ill. 351; *Miller v. Excelsior Stone Co.*, 1 Bradw. 273 (1878).

²*Stevens v. Androscoggin W. P. Co.*, 62 Me. 498 (1874).

³*Williams v. Smith*, 4 Ill. 524 (1842); *Gordon v. Casey*, 23 *Ib.* 70 (1859). So, where a note is made payable at a certain time "on condition that the banks of Tennessee have resumed payment at that time, * * * and if not, as soon as they do resume," *Walters v. McBee*, 1 B. J. Lea 364 (1878).

⁴*McGehee v. Childress*, 2 Stew. 506 (Ala. 1830).

⁵*Odiorne v. Odiorne*, 5 N. H. 315 (1831); *Congregational Soc. v. Goddard*, 7 *Ib.* 480 (1835). But see *Drown v. Smith*, 3 *Ib.* 300.

⁶*Shackleford v. Hooker*, 54 Miss. 716 (1877); *Nagle v. Horner*, 8 Cal. 353. And where, for instance, a note for \$75 contains a condition that "if paid by April 1st, \$50 shall discharge it," a payment of that amount on the ninth of April, although before maturity of the note, is no performance of the condition, *Holland v. Vanard*, 3 Greene 230 (Iowa 1851). But it seems that if the performance has been prevented by the maker's own action he cannot avail himself of the failure, *King v. King*, 69 Ind. 467 (1880).

⁷*Jackson v. Stockbridge*, 29 Tex. 394 (1867). The following cases may be consulted as to performance of particular conditions. *Location of railroad*: *Davenport & St. P. R. R. v. Rogers*, 39 Iowa 298 (1874). *Building of railroad*: *Thompson v. Oliver*, 18 Iowa 417 (1865). *Assent of heirs to payment in C. S. A. notes*: *Martin v. Singleton*, 23 La. An. 551 (1871). *Rendering prisoner on capias*: *Daggett v. Gage*, 41 Ill. 465 (1866). *Paying another note* (since barred by the Statute of Limitations): *Jordan v. Fountain*, 51 Cal. 332 (1874). *C. S. A. conscription*: *Lively v. Robbins*, 39 Ala. 461 (1864).

⁸*In re State Fire Ins. Co.*, 32 L. J. Ch. 300 (1862). So, an agreement that a note should not be considered such, *San Jose Sav. Bank v. Stone*, 59 Cal. 183 (1881).

III. ITS LIMITED CHARACTER.

- 96. Payable in **Money Only**—American Statutes.
- 97. " **in Specie** "—" **Gold**."
- 98. Legal Tender Act and Decisions.
- 99. Payable in " **Current Funds** "—" **Currency**."
- 100. **Bank Notes**.
- 101. **Merchandise or Work**.
- 102. " **Sterling** "—" **Dollars**."
- 103. **Parol Evidence**.

§ 96. **Payable in Money Only—American Statutes.**—No rule of commercial paper is better established than that which requires it to be for the payment of money and money only.¹ In some of the States this rule has been changed by statute.² Under the common law the following bills and

¹ Byles 94; Chitty 153; 1 Daniel 60; 1 Edwards § 147; 1 Parsons 45; Story on Bills § 43; Story on Prom. Notes § 17; Hosstatter v. Wilson, 36 Barb. 307.

² In *Alabama* only "bills of exchange, promissory notes payable in money at a bank or private banking-house and paper issued to circulate as money," are made negotiable, other contracts in writing being assignable subject to defense (Code of 1876 § 2100; Act of 1838). See, too, *Oates v. Nat. Bank*, 11 Otto 239 (1879). In *Arkansas* bills, notes and other contracts "for the payment of money or property or both" are assignable (Rev. St. 1874 § 563); subject, however, to equities (§ 565), except "bills of exchange or negotiable notes transferred in good faith and for value before maturity, but such instruments shall be governed in all respects by the rules of the law merchant concerning commercial and negotiable paper" (Acts of 1869 and 1873; Rev. St. 1874 § 566). Bills of exchange include drafts or orders drawn by one person on another "for the payment of a certain sum of money therein specified" (*Ib.* § 561). In *California* "a negotiable instrument is a written promise or request for the payment of a certain sum of money to order or bearer" (Civil Code of 1872 § 8087). It must be "payable in money only" (*Ib.* § 8088), although it may also "give to the payee an option between the payment of the sum specified therein and the performance of another act," but as to the latter provision it is not negotiable (*Ib.* § 8090). Other non-negotiable contracts for the payment of money or personal property are assignable subject to defense (*Ib.* § 6459; Code Civ. Proc. of 1872, § 10368). In *Colorado* the statute of Anne has been enacted, applicable to promises to pay "any sum of money or article of personal property or any sum of money in personal property," the right of the assignee to sue his assignor being made conditional on his due diligence in prosecuting the maker (Gen. L. 1877 p. 110 §§ 90-94). In *Connecticut* negotiable promissory notes must be "for the payment of money only" (Act of 1811; Gen. St. Rev. 1875 p. 343 § 1). In *Dakota* the same provisions have been enacted as in *California* (Rev. Code 1877 §§ 1821, 1822, 1824). In *Georgia* a promissory note may be for the payment of "money or other articles of value" (Code 1873 § 2774; Act of 1799; Daniel v. Andrews, Dudley 157). In *Idaho* only notes for the payment of "a sum of money" are made negotiable (Rev. L. 1875 p. 652 § 1) like inland bills of exchange, but the provisions of the *Colorado* statute above mentioned have been enacted (*Ib.* p. 648 §§ 1-4). In *Illinois* the provisions are the same as in *Colorado* (1845 R. S. p. 384; 1880 R. S.

notes have been held payable in money and negotiable, viz.: "in current money;"¹ "in current money of Kentucky;"² "in lawful current money of Pennsylvania;"³ "in good

Hurd's Ed. c. 98 §§ 3-7). In *Indiana* promises "to pay money * * * and for the delivery of a specific article or to convey property or to perform any stipulation therein mentioned shall be negotiable" (1 R. S. 1876, Davis' Ed. c. 177 § 1); subject, however, to defense (*Ib.* § 3), except in case of inland (*Ib.* § 5) and foreign bills and notes payable to order or bearer in an Indiana bank (*Ib.* § 6). In *Iowa* instruments for the payment of a sum of money in property or labor, or to deliver property or labor or acknowledging property or labor to be due, "are negotiable with all the incidents of negotiability, whenever it is manifest from their terms that such was the intent of the maker, but the use of the technical words "order" or "bearer" alone will not manifest such intention," (Rev. Code 1880 § 2085). In *Kentucky* all bonds, bills and notes for money or property are assignable subject to defense (1877 G. S. c. 22 § 6). Bills, drafts or checks payable in bank notes or currency or other funds are negotiable as if for money, except that only the value of the currency mentioned can be recovered (1877 G. S. c. 22 § 11). In *Maryland* the British statute, 3 and 4 Anne c. 9, is still in force (Bill of Rights, Art. V.; Alexander's Brit. Stats. p. 649). In *Mississippi* only notes for the payment of a sum of money are properly negotiable, notes payable in "any other thing" being merely assignable subject to equities (1880 Rev. Code §§ 1123, 1124; 1871 Rev. Code §§ 2227, 2228). In *Missouri* only notes "for the payment of money" are clothed by statute with the negotiable character of inland bills of exchange (1 R. S. 1879 c. 10 § 547; 1872, Wagner Ed., p. 216 § 15). In *Nebraska* all negotiable instruments must be "for a sum or sums of money certain" (1873 G. S. c. 32 § 1; 1866 R. S. c. 27). In *Nevada* negotiable notes must be for the payment of a "sum of money therein mentioned" (1 Comp. L. 1873 c. 5 § 9; 1861 P. L. p. 4). So in *New Jersey* (1795 Pat. Rev. p. 342 § 4; 1874 Rev. p. 897 § 1). So in *New York* (2 R. S., Ed. 1875, p. 1160 § 1; 1 R. L. 1801 p. 151). In *North Carolina* negotiable instruments must be for money (1873 Bat. Rev. c. 10 § 1). So in *Ohio* (1880 R. S. § 3171; 1830 P. L. p. 217 § 1). So in *Oregon* (1872 G. L. p. 717 c. 48 § 1; Act of 1854). In *Pennsylvania* bills of exchange, drafts, notes, checks, &c., drawn or indorsed in *Pennsylvania* "payable in any other State, Territory, country or place," may be payable "in current funds" or in money with rate of exchange or like qualification superadded (1872 Purd. Dig. p. 1173 § 2; 1849 P. L. p. 427 § 11). In *Rhode Island* negotiable notes must be for the payment of money only (1872 G. S. c. 129 § 6). So in *South Carolina* (1873 R. S. p. 319 § 8). So in *Tennessee* (1762 P. L. c. 9 § 2; 1871 C. S. § 1956). And the same is true of every negotiable sealed bill, bond or note (1786 P. L. c. 4 § 1; 1871 C. S. § 1957). But bills or notes for specific articles are only assignable (1871 C. S. § 1967; 1801 P. L. c. 6 § 54 modified). In *Vermont* negotiable bills and notes must be for the payment of money (1862 G. S., Ed. 1870, p. 508 § 5). So, in *Virginia*, negotiable notes and checks (1873 Code c. 141 § 7; 1 Rev. Code 483 § 2). And in *West Virginia* (1879 R. S. c. 12 § 7). So, in *Wisconsin*, all negotiable notes (1879 R. S. § 1675).

¹ *Bainbridge v. Owen*, 2 J. J. Marsh. 433 (1829). So, a bill payable in "current funds" has been held to be payable in current money and negotiable. *Laird v. State*, 61 Md. 309 (1883). If payable in "current money" the amount of recovery will be the specie value of such currency as it would be most for the promisor's interest to have paid, *Miller v. McKinney*, 5 B. J. Lea 93 (1880).

² *M'Chord v. Ford*, 3 T. B. Mon. 166 (1826), there being no current money in Kentucky at that time except specie.

³ Meaning congressional legal tender, *Wharton v. Morris*, 1 Dall. 124 (1785).

current money of this State;"¹ in "lawful money;"² "in York State bills or specie;"³ "in exchange."⁴ And in Texas notes payable "in good solvent cash notes" have been held to be payable in money.⁵ The contrary has been held in Alabama.⁶

On the other hand, the following bills and notes have been held not payable in money and not negotiable, viz.: "in New York funds;"⁷ "in Tennessee money;"⁸ "in current Mississippi bank money;"⁹ "in Tennessee or Alabama money or its equivalent;"¹⁰ "in Arkansas money of the Fayetteville Branch;"¹¹ "in Canada money," the note being made in the United States;¹² "in Brandon money;"¹³ in "foreign bills;"¹⁴ in "paper medium;"¹⁵ "in East India bonds,"¹⁶ in United States bonds;¹⁷ in Confederate bonds

¹Graham v. Adams, 5 Ark. 261 (1843).

²Dorrance v. Stewart, 1 Yeates 349 (1794), the note being made in Connecticut and intended to mean lawful money of Connecticut.

³Keith v. Jones, 9 Johns. 120 (1872). See N. Y. Statutes; 1 R. L. 229; 1 R. S. 768.

⁴Bradley v. Lill, 4 Biss. C. C. 473 (1867), overruling Lowe v. Bliss, 24 Ill. 168.

⁵Baker v. Todd, 6 Tex. 273; Smith v. Falwell, 21 *Ib.* 466 (1858), distinguishing such notes from a promise to pay *in* cash notes. But in Lawrence v. Dougherty, 5 Yerg. 435 (1829) a note for \$500 "which may be discharged in merchantable cotton" was held to be the same thing as a note payable in cotton, and, therefore, not negotiable. Notes payable "in good solvent cash notes" are said to constitute a "money demand" on failure to deliver the notes, Grant v. Burleson, 38 Tex. 214 (1873). But see, *contra*, Ward v. Latimer, 2 Tex. 245 (1847).

⁶Williams v. Sims, 22 Ala. 512 (1853). And see, to like effect, Hopkins v. Seymour, 10 Tex. 202 (1853).

⁷Hasbrook v. Palmer, 2 McLean 10 (1839).

⁸Meaning Tennessee bank notes, Taylor v. Neblett, 4 Heisk. 491 (1871). But see Searcy v. Vance, Mart. & Yerg. 225, to the effect that such expression is equivalent to money and makes a negotiable note. So, as to "Arkansas money," Wilburn v. Greer, 6 Ark. 255 (1845).

⁹That is, Mississippi bank notes, Hopson v. Fountain, 5 Humph. 140 (1844).

¹⁰Chevallier v. Buford, 1 Tex. 503 (1846).

¹¹Hawkins v. Watkins, 5 Ark. 481 (1844).

¹²Thompson v. Sloan, 23 Wend. 71. This is the case also of a note made in Canada and payable "in Canada bills," although provincial notes were authorized and made a legal tender by statute of 29 & 30 Vict. c. 10, Gray v. Worden, 29 Q. B. 535 (Up. Can. 1870).

¹³Gordon v. Parker, 2 Sm. & M. 495 (1844).

¹⁴Meaning bills of country banks, Jones v. Fales, 4 Mass. 245 (1808).

¹⁵Lange v. Kohne, 1 McCord 115 (1821).

¹⁶Byles 94; Bull N. P. 272.

¹⁷Easton v. Hyde, 13 Minn. 90 (1868); Blouin v. Liquidators of Hart, 30 La. An. 714 (1878).

(illegal and void).¹ It is said, however, that a purchase-money note for land payable "in Mississippi certificates of indebtedness," is so far a note for money as to be secured by a vendor's lien.²

A note payable in money will not lose its negotiability by reason of an option contained in it for payment in United States bonds.³ But a note payable "in bank stock or lawful money of the United States" is not a negotiable note for the payment of money.⁴ Where the means of payment provided for are not money, it follows that the damages recoverable are not the amount named but the value of the medium named in money.⁵

It is believed that the rule requiring commercial paper to be payable in money only, except so far as it has been changed by a few statutes in the United States, is a universal one. It is implied in the definitions and other provisions of nearly every foreign Commercial Code, and assumed without discussion by French and German writers on commercial law.⁶

§ 97. Payable "In Specie"—"Gold"—U. S. Legal Tender.—A bill of exchange or promissory note payable "in gold" or "in specie" is for the payment of money and not for bullion or merchandise.⁷ And, therefore, as such, its negotiabil-

¹ *Prigeon v. Smith*, 31 Tex. 171 (1868).

² *Deacon v. Taylor*, 53 Miss. 697 (1876). On the other hand, a promise in writing to pay "county scrip" has been held to be an agreement and not a note, *Jones v. State*, 40 Ark. 344 (1883).

³ *Dinsmore v. Duncan*, 57 N. Y. 573 (1874); but such quality is lost by the holder's indorsing his option to take bonds in payment, *Id.*

⁴ *Alexander v. Oaks*, 2 Dev. & Bat. 513 (1837). See Act of 1786, 1 R. S. c. 13 § 3. So, a note containing an option to pay in money or property is not negotiable, *Taylor v. Tompkins*, 1 Tex. App. 1050 (1881). In such notes the election belongs to the debtor and the creditor can only demand money on the debtor's failure to exercise his option, *Nipp v. Dickey*, 81 Ind. 214 (1881).

⁵ *Hopson v. Fountain*, 5 Humph. 140 (1844); *Chevallier v. Buford*, 1 Tex. 503 (1846); *Gordon v. Parker*, 2 Sm. & M. 495 (1844).

⁶ In *Italy* notes may be made to order for payment in produce, subject to the same regulations as notes payable in money (1865 Code Com. Arts. 275, 276). But such notes or bills must be payable at a time fixed (Art. 278). In *Mexico* (1854 Code Com. Art. 223) bills of exchange must be for the payment of an amount particularly specified "in actual and current money."

⁷ *Chrysler v. Renois*, 43 N. Y. 209 (1870), on a bill of exchange payable "in gold dollars;" *Wood v. Bullen*, 6 Allen 516 (1863).

ity has passed unquestioned. In like manner a note payable "in specie or its equivalent" is a note for money, on which an action of debt, not covenant, will lie.¹ This view is, however, opposed to that of an earlier case in Texas, where a note payable "in lawful funds of the United States or its equivalent" was held to be a contract for coin, non-negotiable and only assignable in equity.²

§ 98. **Legal Tender Act and Decisions.**—The United States Legal Tender Act of 1862 provides that the United States notes issued under that act "shall be lawful money and a legal tender in payment of all debts, public and private, within the United States, except for duties on imports and interest on the public debt."³ This act led to many conflicting decisions, the principal of which are noted in the following sections. In 1865 it was held to be unconstitutional by the Court of Errors of the State of Kentucky, so far as it affected contracts made prior to the passage of the act.⁴ This decision was affirmed by the Supreme Court of the United States, in December, 1869, and judgment to that effect announced by the court in the following February.⁵

¹*Rhyne v. Wacaser*, 63 N. C. 36 (1868). And it has been held that a note payable "in gold or its equivalent in notes," may be satisfied by payment of the sum named in U. S. legal tender notes. *Killough v. Alford*, 32 Tex. 451 (1870), and that in such case judgment should be rendered for gold or its equivalent in U. S. legal tender notes and that a judgment for the amount in gold is erroneous. *Wells v. Van Sicle*, 6 Nev. 45 (1870). But see *Holt v. Given*, 43 Ala. 612 (1869), where it was held that payment of such note could only be made in legal tender notes of equivalent value.

²*Ogden v. Slade*, 1 Tex. 13 (1846), *Lipscomb, J.*, saying: "By equivalent the parties must have meant such paper currency as passed at par with gold. This alternative of an equivalent would perhaps restrain the negotiability and destroy the mercantile character of the paper so that it would not pass by delivery and the holder might not maintain a suit in his own name on it at common law."

³U. S. Rev. Stats. § 3588. This was afterward extended to the Greenback issues of 1863, 1864 and 1872, the latter, however, not extending to the redemption of bank notes "calculated and intended to circulate as money," R. S. § 3590.

⁴*Griswold v. Hepburn*, 2 Duv. 20 (1865). This case was upon a promissory note for "eleven thousand dollars" made in 1860 and falling due February 20th, 1862, five days before the passage of the Legal Tender Act. The judgment was for recovery in gold or its equivalent value.

⁵*Hepburn v. Griswold*, 8 Wall. 603. As to the argument urging the necessity of the Legal Tender Act as incident to the power to make war, Chief Justice Chase says (p. 625): "We are obliged to conclude that an act making mere promises to pay dollars a legal tender in payment of debts

Fifteen months later it was expressly overruled by the same court, and the Legal Tender Act has since that time been generally held by the courts to be applicable to contracts made before its passage.¹

previously contracted is not a means appropriate, plainly adapted, really calculated to carry into effect any express power vested in Congress, that such an act is inconsistent with the spirit of the constitution, and that it is prohibited by the constitution." Mr. Justice Miller, dissenting from this, says (p. 639): "If the act to be considered is in any sense essential to the execution of an acknowledged power, the degree of that necessity is for the legislature and not for the court to determine." The judgment was rendered by a vote of five judges for affirmance, (Chase, C. J., Nelson, Clifford, Grier and Field, JJ.), three judges dissenting, (Miller, Swayne and Davis, JJ.)

¹Legal Tender Cases, 12 Wall. 457 (May, 1871). This case overruled, *Hepburn v. Griswold*, by a similar vote of five judges, (Miller, Swayne, Davis, Strong and Bradley, JJ.), four judges dissenting, (Chase, C. J., and Nelson, Clifford and Field, JJ.) The personnel of the court had been changed in the meantime by the resignation of Mr. Justice Grier and the appointment of Messrs. Justices Strong and Bradley. For a protest against this extraordinary action of the court and an account of the circumstances by which it was brought about, the reader is referred to the dissenting opinions of Chief Justice Chase (p. 572) and Mr. Justice Clifford (p. 604). Mr. Justice Bradley, in his opinion (p. 567), says: "I do not say that it is a war power or that it is only to be called into exercise in time of war." And Mr. Justice Strong says of the obligation of the contract (p. 548): "It was not a duty to pay gold or silver or the kind of money recognized by law at the time when the contract was made, nor was it a duty to pay money of equal intrinsic value in the market. The expectation of the creditor and the anticipation of the debtor may have been that the contract would be discharged by the payment of coined metals, but neither the expectation of one party to the contract respecting its fruits, nor the anticipation of the other constitutes its obligation. * * * The obligation of a contract to pay money is to pay that which the law shall recognize as money when the payment is to be made." (In the *Hepburn* case that would have been coin.)

This principle has since been extended by the U. S. Supreme Court, in *Juilliard v. Greenman*, 110 U. S. 449 (1884), to greenbacks re-issued under the Act of 1878 (Field, J., dissenting). The opinion of the court, read by Mr. Justice Gray, puts the Act upon a peace footing as follows: "Congress, as a legislature of a sovereign nation, being expressly empowered by the constitution 'to lay and collect taxes, to pay the debts and provide for the common defense and general welfare of the United States,' and 'to borrow money on the credit of the United States,' and 'to coin money and regulate the value thereof and of foreign coin,' and being clearly authorized and as incidental to the exercise of those great powers to emit bills of credit, to charter national banks, and to provide a national currency for the whole people in the form of coin, treasury notes and national bank bills; and the power to make the notes of the government a legal tender in payment of private debts being one of the powers belonging to sovereignty in other civilized nations and not expressly withheld from congress by the constitution: we are irresistibly impelled to the conclusion that the impressing upon the treasury notes of the United States the quality of being a legal tender in payment of private debts is an appropriate means, conducive and plainly adopted to the execution of the undoubted powers of congress, consistent with the letter and spirit of the constitution, and therefore, within the meaning of that instrument, necessary and proper for carrying into execution the powers vested by this constitution in the government of the United States."

And it has been held that a note payable "in gold" may be satisfied under the Legal Tender Act by payment in legal tender notes.¹ And, where made in 1858 "to be paid in gold or silver," judgment for the amount in "dollars" was held to be correct.² Indeed, the addition of the words "in gold" was held to be an immaterial alteration in 1860, when there was no other means of payment.³ So, too, United States legal tenders have been held sufficient payment of a note "payable in specie."⁴ But in a later case in Vermont it was held that the holder was entitled to an amount of currency equivalent in value to the amount in specie at the time of rendering judgment.⁵ And in the U. S. Supreme Court it was held at the same term at which the Legal Tender cases were decided, that a note "payable in specie" could only be satisfied by payment in coined dollars.⁶ And this may now be regarded as the rule regarding bills, notes and other contracts payable either "in gold" or "in specie."⁷

The rule is still clearer that judgment must be for coin on all notes and bills payable "in coin;"⁸ or "in gold and silver

¹ *Buehgger v. Schultz*, 13 Mich. 420 (1865); *Jump v. Peltier*, 18 La. An. 193 (1866); *Riley v. Sharp*, 1 Bush 348 (1866); *Gist v. Alexander*, 12 Rich. 50 (1867). See, too, *Shollenberger v. Brinton*, 52 Penna. St. 9 (1866), virtually overruled in *McCalla v. Ely*, 64 *Ib.* 254 (1870). But it was held in *Glass v. Pullen*, 6 Bush 346 (1869), that a judgment on such note should be for gold or its equivalent in legal tender notes, and that such a note given for a loan of equal amount in legal tender notes, was a usurious contract; and in *Hittson v. Davenport*, 4 Col. 169 (1878), that a payment in currency on such note should only be credited to the amount of its value in gold, the note being for so many "dollars gold * * * in gold."

² *Johnson v. Vickers*, 1 Duv. 266 (1864).

³ *Bridges v. Winters*, 42 Miss. 135 (1868).

⁴ *Wood v. Bulien*, 6 Allen 516 (1863). So, *Flournoy v. Healy*, 31 Tex. 590 (1869), where the note was for a specified sum "in specie" or a larger sum "in U. S. currency" and the judgment was rendered for the smaller sum.

⁵ *Townsend v. Jennison*, 44 Vt. 315 (1872). But see *Flournoy v. Healy*, 31 Tex. 590 (1869).

⁶ *Trebilcock v. Wilson*, 12 Wall. 687 (1871), *Miller and Bradley, JJ.*, dissenting.

⁷ And where a note is payable "in gold or its equivalent in currency," the recovery will be an amount in currency equal in value to the amount named in gold, *Dunn v. Barnes*, 73 N. C. 273 (1875). And as to the enforcement of such contracts, see *Burnett v. Stearns*, 33 Cal. 468 (1867); *Bridges v. Reynolds*, 40 Tex. 204 (1874).

⁸ *Poett v. Stearns*, 31 Cal. 78 (1866); *Phillips v. Dugan*, 21 Ohio St. 466 (1871); *Smith v. Wood*, 37 Tex. 616 (1872); *Bowen v. Darby*, 14 Fla. 202

coin;”¹ or in “gold dollars;”² or “lawful silver money;”³ or in “English golden guineas and other gold and silver at the present established weight and rate;”⁴ or “in gold coin of the United States of the present standard of weight and fineness, notwithstanding any law which now may or hereafter shall make anything else a tender in payment of debts.”⁵

§ 99. Payable in “Current Funds”—“Currency.”—It appears to be established in some States that a bill or note payable in “current funds” is payable in money and therefore negotiable.⁶ So, too, a note payable “in current funds of the State of Ohio;”⁷ or “in funds current in the City of New York;”⁸ or a certificate of deposit for \$100 “in funds * * * to be paid in like funds.”⁹ In other States the contrary has been held as to instruments payable: “in current funds;”¹⁰ “in current funds at Pittsburgh;”¹¹ “in New York funds or their equivalent.”¹²

The same difference prevails in the decisions as to bills

(1872); *Churchman v. Martin*, 54 Ind. 380 (1876). Although it was held that judgment on such a note should be for “dollars,” not for coin, in *Preston v. Breedlove*, 36 Tex. 96 (1871).

¹ *Bronson v. Rodes*, 7 Wall. 229 (1868), approved in *Trebilcock v. Wilson*, 12 *Ib.* 687 (1871), *Miller, J.*, dissenting in both cases. So, too, if payable “in gold or silver coin,” *Smith v. McKinney*, 22 Ohio St. 200 (1871). But see, *contra*, *Hastings v. Johnson*, 2 Nev. 190 (1866); *Glover v. Robbins*, 49 Ala. 220 (1873).

² *Lafitte v. Rivera*, 23 La. An. 32 (1871). This decision relied on the authority of *Hepburn v. Griswold*, 8 Wall. 603, since overruled in the *Legal Tender cases*, 12 Wall. 457.

³ *McCalla v. Ely*, 64 Penna. St. 254 (1870), overruling *Shollenberger v. Brinton*, 52 *Ib.* 9 (1866).

⁴ *Butler v. Horwitz*, 7 Wall. 258 (1868).

⁵ *Dutton v. Pailaret*, 52 Penna. St. 109 (1866).

⁶ *American Emigrant Co. v. Clark*, 47 Iowa 671 (1878). To the same effect see *Wood v. Price*, 46 Ill. 435 (1868); *Galena Ins. Co. v. Kupfer*, 28 *Ib.* 332 (1862); *Kupfer v. Marc*, *Ib.* 388, affirmed as *Marc v. Kupfer*, 34 *Ib.* 86 (1864); *Williams v. Arnis*, 30 Tex. 37 (1867). See, too, *Blood v. Northrup*, 1 Kans. 28 (1862).

⁷ *White v. Richmond*, 16 Ohio 5 (1847).

⁸ *Lacy v. Holbrook*, 4 Ala. 88 (1842).

⁹ *Swift v. Whitney*, 20 Ill. 144 (1858).

¹⁰ *Platt v. Sank Co. Bank*, 17 Wis. 222 (1863); *Lindsey v. McClelland*, 18 *Ib.* 505 (1864); *Johnson v. Henderson*, 76 N. C. 227 (1877); *Haddock v. Woods*, 46 Iowa 433 (1877); *National State Bank v. Ringel*, 51 Ind. 293 (1875); *Cornwell v. Pumphrey*, 9 Ind. 135 (1857).

¹¹ *Wright v. Hart*, 44 Penna. St. 454 (1863).

¹² *Hasbrook v. Palmer*, 2 McLean 10 (1839).

and notes payable "in currency." Such instruments are held to be negotiable in many States.¹ So, too, a note payable in "greenback currency;"² or in "paper currency" (meaning legal tender notes);³ or "in currency at its specie value;"⁴ or "in the common currency of the country, that which will pay taxes;"⁵ or "in currency at the present rates, 148 to 100, or in whatever good currency may be used at the time the note falls due," such note being payable in U. S. currency, although of improved value.⁶ In North Carolina, however, "undepreciated currency" was held not to mean coin but "ordinary commercial and business currency."⁷

The following expressions also have been held to mean cash or money, the instrument payable in such manner being negotiable, viz.: "New York State currency;"⁸ "currency of the State of Mississippi;"⁹ "Kentucky currency;"¹⁰ "cur-

¹Howe v. Hartness, 11 Ohio St. 449 (1860); Fry v. Dudley, 20 La. An. 368 (1868); Butler v. Paine, 8 Minn. 324 (1868); Klauber v. Biggerstaff, 47 Wis. 551; S. C., 9 Cent. L. J. 488 (collecting and reviewing a great number of American cases); Phelps v. Town, 14 Mich. 374 (1866), Christianity, J., defining currency to be "money current by law or paper equivalent in value circulating in the community at par." In Swift v. Whitney, 20 Ill. 144, Walker, J., says: "By the term *currency* is understood bank bills or other paper money issued by authority, which pass as and for coin. * * * It would seem that current bills or currency are of the value of cash and exclude the idea of depreciated paper money." See, too, the remarks of Field, J., in Trebilcock v. Wilson, 12 Wall. 695; also Taup v. Drew, 10 How. 218.

²Burton v. Brooks, 25 Ark. 215 (1868), national bank notes not being included in such designation.

³Frank v. Wessels, 64 N. Y. 155 (1876).

⁴Caldwell v. Craig, 22 Gratt. 340 (1872), such note being held to be payable in specie.

⁵Johnson v. Miller, 76 N. C. 439 (1877), U. S. legal tender notes being meant, at least *prima facie*.

⁶Echols v. Grattan, 42 Ga. 547 (1871).

⁷Blackburn v. Brooks, 65 N. C. 413 (1871).

⁸Ehle v. Chittenango Bank, 24 N. Y. 548 (1862).

⁹Mitchell v. Hewitt, 5 Sm. & M. 361 (1845), *i. e.* not bank notes but specie.

¹⁰Lampton v. Haggard, 3 T. B. Mon. 149 (1826). See, too, as to the meaning of "Illinois currency," Marine Bank v. Berney, 28 Ill. 90 (1862); Marine Bank v. Rushmore, *Id.* 463 (1862); Chicago Ins. Co. v. Keiron, 27 *Id.* 501 (1862), approving the definition of "currency" in Wharton's Law Lex. 236 as "bank notes or other paper money issued by authority, and which are continually passing as and for coin." And in Springfield Marine, &c., Ins. Co. v. Tincher, 30 Ill. 399 (1863), it was held that a certificate of deposit for "currency" since depreciated must be paid in bills passing as coin.

rency of Missouri;"¹ "currency of Zanesville;"² "Canada currency;"³ "current money of the State of Alabama."⁴

On the other hand the following have been held not to be negotiable, viz.: "in currency;"⁵ "common currency of Arkansas" (or Alabama);⁶ "in the currency of Kentucky;"⁷ "in Pennsylvania or New York paper currency to be current in the State of Pennsylvania or the State of New York;"⁸ "current notes of the State of North Carolina;"⁹ "in currency of the country, but not in Confederate notes."¹⁰

§ 100. **Payable in Bank Notes.**—It is generally agreed that paper payable in bank notes or bills loses its negotiable character. This is so, if it is payable "in bank notes;"¹¹ or "in current bank notes;"¹² or "in current bills;"¹³ or "in cash or Bank of England notes;"¹⁴ or "in office notes of the

¹Cockrill v. Kirkpatrick, 9 Mo. 688 (1846). And it was held in this case that parol evidence was inadmissible to show that depreciated notes were intended.

²Dugan v. Campbell, 1 Ohio 115 (1823).

³Black v. Ward, 27 Mich. 191 (1873).

⁴Carter v. Penn, 4 Ala. 140 (1842), meaning coin, not bank notes.

⁵Bank of Mobile v. Brown, 42 Ala. 108; Huse v. Hamblin, 29 Iowa 501 (1870); Rindskopf v. Barrett, 11 Ib. 172 (1860); Ford v. Mitchell, 15 Wis. 334; Farwell v. Kenneth, 7 Mo. 595 (1842).

⁶Bank notes being intended, Dillard v. Evans, 4 Ark. 185 (1842); Carlisle v. Davis, 7 Ala. 42 (1844).

⁷Chambers v. George, 5 Litt. 335, bank notes being the currency intended.

⁸Leiber v. Goodrich, 5 Cow. 136 (1825).

⁹Warren v. Brown, 64 N. C. 381 (1870).

¹⁰Coffin v. Hill, 1 Heisk. 385 (1870). This was held to be payable in current bank notes current at its maturity, although depreciated, and a verdict was had for "dollars."

¹¹State v. Corpening, 10 Ired. 58 (1849); Jones v. Fales, 4 Mass. 245 (1808); Childress v. Stuart, Peck 276 (Tenn. 1823). So in Gray v. Donahoe, 4 Watts 400 (1835), Sergeant, J., saying: "No principle is better established nor more necessary to be maintained than that bank notes are not money in the legal sense of the word. * * * Bank notes are merely promissory notes for the payment of money."

¹²Gamble v. Hatton, Peck 130 (Tenn. 1823); Kirkpatrick v. McCullough, 3 Humph. 171 (1842); Simpson v. Moulden, 3 Coldw. 429 (1866); McDowell v. Keller, 4 Ib. 258 (1867); Little v. Phenix Bank, 2 Hill 425 (1842); affirmed, 7 Ib. 359; Pardee v. Fish, 60 N. Y. 265 (1875); Gray v. Donahoe, 4 Watts 400 (1835); Jackson v. Waddill, 1 Stew. (Ala.) 579; Young v. Scott, 5 Ala. 475 (1843). Damages in such case being the value of the bank notes at the maturity of the bill, Moore v. Gooch, 6 Heisk. 104 (1871); McDowell v. Keller, 4 Coldw. 258 (1867); Hopson v. Fountain, 5 Humph. 140 (1844). But, *contra*, Fleming v. Nall, 1 Tex. 246 (1846).

¹³Collins v. Lincoln, 11 Vt. 268 (1839).

¹⁴Byles 94; *Ex parte* Inceon, 2 Rose 225; but see 3 & 4 Will. 4 c. 98 § 6.

bank" (payee);¹ or "in current bank notes receivable at the counter of said bank;"² or "in notes of the United States Bank or either of the Virginia banks;"³ or in "North Carolina bank notes;"⁴ or "in good North Carolina bank bills;"⁵ or in "bank notes of the chartered banks of Pennsylvania;"⁶ or in "current bank notes of Tennessee;"⁷ or "in Tennessee money," meaning Tennessee bank notes;⁸ or in "current Mississippi bank money," meaning Mississippi bank notes;⁹ or "in current notes of either of the banks of N.;"¹⁰ or in "Shamokin bank notes."¹¹ But in early cases in Ohio the contrary has been held as to bills payable "in current Ohio bank notes;"¹² or "in current bank notes of Cincinnati."¹³ So, too, in an early case in New York of a note payable "in bank notes current in the city of New York;"¹⁴ and in Mississippi of a note payable "in notes of the banks of the State of Mississippi payable and negotiable in any bank in the State of Mississippi."¹⁵

§ 101. **Payable in Merchandise or Work.**—Except where it is otherwise provided by statute, as already noted, instruments for payment in goods are not bills of exchange or

¹ *Irvine v. Lowry*, 14 Pet. 293 (1840).

² *Fry v. Rousseau*, 3 McLean 106 (1842).

³ *Beirne v. Dunlap*, 8 Leigh 514 (disapproving *Crawford v. Daigh*, 2 Va. Cas. 521; *Campbell v. Weister*, 1 Litt. 30; *January v. Henry*, 3 T. B. Mon. 8; *Noe v. Preston*, 5 J. J. Marsh. 57). And it has been held that proof of a note "to be paid in notes on the Bank of Kentucky or the Branch Bank at L." will not sustain a declaration on a note payable in money, *Osborne v. Fulton*, 1 Blackf. 234.

⁴ *Kirkpatrick v. McCullough*, 3 Humph. 171 (1842), overruling *Deberry v. Darnell*, 5 Yerg. 451 (1830).

⁵ *Patton v. Hunt*, 64 N. C. 163 (1870).

⁶ *McCormick v. Trotter*, 10 S. & R. 9* (1823).

⁷ *Whiteman v. Childress*, 6 Humph. 303 (1845).

⁸ *Taylor v. Neblett*, 4 Heisk. 491 (1871).

⁹ *Hopson v. Fountain*, 5 Humph. 140 (1844).

¹⁰ *Bonnell v. Covington*, 7 How. 322 (Miss. 1843).

¹¹ *Shamokin Bank v. Street*, 16 Ohio St. 1 (1864).

¹² *Swetland v. Creigh*, 15 Ohio 118 (1846).

¹³ *Morris v. Edwards*, 1 Ohio 205 (1823).

¹⁴ *Judah v. Harris*, 19 Johns. 144 (1821), the court taking notice that such notes are of cash value throughout the State.

¹⁵ *Besancon v. Shirley*, 9 Sm. & M. 457 (1848), under the statute, H. & H. Dig. 373 § 12.

promissory notes, although in form negotiable in all other respects.¹ In like manner, an order for the delivery of certain specified drafts is not a bill of exchange.² Neither is an instrument payable in specific goods "or cash" negotiable;³ nor one payable in bank stock or lawful money of the United States;⁴ or for the delivery of goods and payment of money.⁵ But in some States by force of the statute negotiable notes and bills may be payable in merchandise.⁶ And in such State a note payable in merchandise imports a consideration.⁷ And even in New York, a note payable in cash, or before its maturity in stock, has been held to be negotiable.⁸ And by bankers' usage scrip certificates for the delivery of stock to the bearer are now recognized as negotiable instruments.⁹

A memorandum written on the back of a note, "this note

¹ *Matthews v. Houghton*, 11 Me. 377 (1834); *Carleton v. Brooks*, 14 N. H. 149 (1843); *Jerome v. Whitney*, 7 Johns. 321 (1811); *Thomas v. Rossa*, *Ib.* 461; *Gushee v. Eddy*, 11 Gray 502 (1858); *Sears v. Lawrence*, 15 *Ib.* 267 (1860); *Farnum v. Virgin*, 52 Me. 578 (1864); *Tibbets v. Gerrish*, 25 N. H. 41 (1852); *Perry v. Smith*, 22 Vt. 361 (1850); *Peay v. Pickett*, 1 Nott & McC. 254 (1818); *Griffith v. Hanks*, 46 Tex. 217 (1876); *Bailey v. Simond*, 6 N. H. 159 (1833); *Clark v. King*, 2 Mass. 524 (1807); *Wingo v. McDowell*, 8 Rich. L. 446 (1832); *Lawrence v. Dougherty*, 5 Yerg. 435 (1829); *Looney v. Pinckston*, 1 Overton 384 (Tenn. 1809); *Gwinn v. Roberts*, 3 Ark. 72 (1838); *Coyle v. Satterthwaite*, 4 T. B. Mon. 124 (1826); *May v. Lansdown*, 6 J. J. Marsh. 165 (1831); *Brown v. Richardson*, 20 N. Y. 472 (1859); *Hyland v. Blodgett*, 9 Oregon 166 (1881); *Auerbach v. Pritchett*, 58 Ala. 451 (1877); *Scudder v. Clarke*, 1 Col. 192 (1870); *Bradley v. Morris*, 4 Ill. 182 (1841)—overruled in 1862 by *Bilderback v. Burlingame*, 27 Ill. 341. And an order for delivery of goods on condition of the delivery of a deed is not negotiable, *Kingsbury v. Wall*, 68 Ill. 311.

² *Burch v. Newberry*, 1 Barb. 648 (1847).

³ *Matthews v. Houghton*, *supra*. Although an instrument for the payment of cash in four months or goods on demand has been held to be negotiable, *Hosstatter v. Wilson*, 36 Barb. 307 (1862).

⁴ *Alexander v. Oaks*, 2 Dev. & Bat. 513 (1837).

⁵ *Martin v. Chantry*, 2 Stra. 1271.

⁶ *Smith v. Giegrich*, 36 Mo. 369 (1865); *Council Bluffs Iron Works v. Cuppy*, 41 Iowa 104 (1875); *Rankin v. Sanders*, 6 How. (Miss.) 52; *Bilderback v. Burlingame*, 27 Ill. 341 (1862), overruling *Bradley v. Morris*, *supra*. And in Illinois a note for \$40, "which may be discharged in good sound corn at 20 cents per bushel," is negotiable, *Borah v. Curry*, 12 Ill. 66 (1850). Likewise a receipt for hogs, "the product of which we promise to pay," &c., *Stewart v. Smith*, 28 Ill. 396 (1862).

⁷ *Rogers v. Maxwell*, 4 Ind. 243 (1853).

⁸ *Hodges v. Shuler*, 22 N. Y. 114.

⁹ *Rumball v. Metropolitan Bank*, L. R. 2 Q. B. D. 194 (1877).

to be paid in wheat," is part of the note and makes it a note payable in merchandise.¹ And in general when a note or bill is payable in property, the property called for must be tendered or paid.² And the maker must hold himself ready to deliver the goods.³ And judgment should be for such property, unless the note has become a money demand.⁴ And this is said to be the case in Texas, on a default.⁵ So, a note payable in corn "estimated at \$20." is satisfied by payment of \$20.⁶ So, a note for the delivery of 200 barrels of oil in consideration of \$400, "reserving the right to pay 25 cents per barrel on payment of the \$400 above mentioned," may be satisfied at the maker's election by payment of \$450.⁷ And it is held in Iowa that a note payable in goods is not entitled to grace.⁸ In like manner, a note payable in labor of any kind is in general not negotiable.⁹ But it is said that a tender of the amount named in money is a good tender of payment of such note;¹⁰ and that after default

¹ *Polo Mfg. Co. v. Parr*, 8 Neb. 379 (1879). So, too, a contemporaneous writing, *Hill v. Huntress*, 43 N. H. 480 (1862); or other contemporaneous agreement, *Vinger Mfg. Co. v. Haines*, 36 Mich. 335 (1877); *Weeks v. Medler*, 20 Kans. 57 (1878). But a memorandum on the margin of a note, "this note is secured by real estate for its exclusive payment," does not make it payable in real estate, *Branning v. Markham*, 12 Allen 454 (1866). So, evidence of a memorandum that the payee "is to take all the flour that he may want for family use and such other articles as he may need previous to the day of payment," is no variance from a declaration on a note as payable in money, *Owen v. Barnum*, 7 Ill. 461 (1845). But it would be a variance to prove that the note was "to be paid in notes on the Bank of Kentucky or the Branch Bank at Lawrenceburg," *Osborne v. Fulton*, 1 Blackf. 234.

² *State v. Shupe*, 16 Iowa 36 (1864).

³ *Smith v. Loomis*, 7 Conn. 110 (1828); *Johnson v. Baird*, 3 Blackf. 153 (1832); *Bailey v. Simonds*, 6 N. H. 159 (1833). See, too, *Barnes v. Graham*, 4 Cow. 452 (1825).

⁴ *Ransom v. Stanberry*, 22 Iowa 334 (1867).

⁵ *Short v. Abernethy*, 42 Tex. 94 (1875); *Atterbury v. Biggerstaff*, 36 Tex. 177 (1871). See, however, *Brasher v. Davidson*, 31 Tex. 190 (1868), where the damages awarded on a note payable in cotton were the highest price of the cotton between the maturity of the note and the trial.

⁶ *Hise v. Foster*, 17 Iowa 23 (1864).

⁷ *Knight v. Conn. River Petroleum Co.*, 44 Vt. 472 (1872).

⁸ *McCartney v. Smalley*, 11 Iowa 85 (1860).

⁹ *Reynolds v. Richards*, 14 Penna. St. 206 (1850); *Quimby v. Merritt*, 11 Humph. 439 (1850). And see *Bothick v. Purdy*, 3 Mo. 82 (1831), where it is said not to be assignable. So, an instrument in the form of a note payable in services and containing an agreement on the payee's part is not a promissory note, *McClellan v. Coffin*, 93 Ind. 456 (1883).

¹⁰ *Ferguson v. Hogan*, 25 Minn. 135 (1878).

in payment, it becomes a money demand and is assignable as such;¹ or, at least, that this is the case where the maker after the maturity of the note had an opportunity to perform the work called for and failed to make a tender of such work.² Moreover, where a note is payable "in wagon work on or before" a certain day, the work to be done may be selected before maturity by the payee, at maturity by the maker.³

§ 102. "**Sterling**"—"Dollars."—Under the general rule that the place of payment is contemplated in construing the terms of the bill or note, the word "sterling" will be construed to mean *sterling where payable*.⁴ If drawn in England, "sterling" means English currency.⁵

So, in general, the term "dollars" in the United States means lawful currency of the United States.⁶ But if made and payable during the war in the seceded States, it will for like reason be construed to be payable in Confederate currency.⁷ And in such case parol evidence is admissible to show that Confederate currency was intended;⁸ or was not

¹Schnier v. Fay, 12 Kans. 184 (1873).

²Schnessler v. Watson, 37 Ala. 98 (1860).

³Johnson v. Seymour, 19 Ind. 24 (1862).

⁴Byles 86; Taylor v. Booth, 1 C. & P. 286.

⁵Landsdowne v. Landsdowne, 2 Bligh 95; Kearney v. King, 2 B. & Ald. 301.

⁶Bank v. Supervisors, 7 Wall. 26 (1868); Thorington v. Smith, 8 *Ib.* 1 (1868). So, Cook v. Lills, 13 Otto 792 (1880), where the note was executed in the Confederate States, but there was no evidence of an understanding for payment in "Confederate dollars."

⁷Donley v. Tindall, 32 Tex. 43 (1869); Confederate Note Case, 19 Wall. 548 (1873).

These cases are apparently opposed to some earlier cases, which refuse the admission of parol evidence to show that by "dollars" was intended "Commonwealth Paper," Baugh v. Ramsey, 4 T. B. Mon. 155 (1826); or bank notes, Noe v. Hodges, 3 Humph. 162 (1842); Pack v. Thomas, 13 Sm. & M. 11 (1849); or depreciated money, McMinn v. Owen, 2 Dall. 173 (1792). And any presumption that Confederate currency was intended, is rebutted by the expression "current funds at the time the note falls due," Hilliard v. Moore, 65 N. C. 540 (1871).

⁸Thorington v. Smith, 8 Wall. 1 (1868); Donley v. Tindall, 32 Tex. 43 (1869); Carmichael v. White, 11 Heisk. 262 (1872); Lobdell's Admr. v. Fowler, 33 Tex. 346 (1870); Miller v. Lacy, *Ib.* 351, although in this last case "dollars" are said to mean *prima facie* United States currency. And to the same effect see Cook v. Lills, 13 Otto 792 (1880). But to the effect that such evidence is inadmissible see Austin v. Kinsman, 13 Rich. Eq. 259 (1867); Leslie v. Langham, 40 Ala. 524; Roane v. Green, 24 Ark. 210 (1866). And an agreement to receive Confederate currency in payment, if without consideration and upon an unfulfilled condition, constitutes no defense to a note, Johnston v. Josey, 34 Tex. 533 (1870).

intended.¹ But it is not admissible to prove by parol that a certificate of deposit for so many “dollars” meant the depreciated bank notes or other currency in which the deposit had been made;² or a currency used in the deposit and since then depreciated.³ And where a deposit has been made in depreciated bills in a bank keeping also a separate account of specie deposits, the holder’s refusal to accept depreciated bills in payment of a check against the deposit does not prejudice his right to protect the check against the maker.⁴

In like manner a note for so many “dollars” is payable in United States currency, although the consideration for it was a loan in depreciated bank notes.⁵ And where a bank is only authorized to issue bills redeemable in gold, it cannot be allowed to set up an agreement to pay in Confederate notes.⁶ On a bill payable in “dollars,” however, a judgment cannot be rendered for coin.⁷ Nor, on the other hand, is a tender of cotton any defense to such a bill or note.⁸

§ 103. **Parol Evidence.**—Furthermore it cannot be shown by parol that “lawful money” means “lawful *silver* money;”⁹ nor can “current lawful money” mean other than what is lawful by statute and it cannot be explained otherwise by parol.¹⁰ So, “current money of Missouri” cannot be shown to mean paper money;¹¹ or “Illinois currency,” or “currency,” or “current funds,” to mean depreciated bank bills;¹²

¹ *Bryan v. Harrison*, 76 N. C. 360 (1877).

² *Osgood v. McConnell*, 32 Ill. 74 (1863).

³ *Marine Bank of Chicago v. Chandler*, 27 Ill. 525 (1862); *Marine Bank of Chicago v. Ogden*, 29 Ill. 248 (1862).

⁴ *Howes v. Austin*, 35 Ill. 396 (1864).

⁵ *Womack v. Walling*, 1 Baxt. 425 (1872).

⁶ *Manufacturers Bank v. Lamar*, 46 Ga. 563 (1872), notwithstanding the scaling ordinance of 1865.

⁷ *Davidson v. Peticolas*, 34 Tex. 27 (1870). But see *Harrell v. Barnes*, 34 Tex. 413 (1870).

⁸ *Lang v. Waters*, 47 Ala. 625 (1872).

⁹ *Alsop v. Goodwin*, 1 Root 196 (1790).

¹⁰ *Lee v. Biddis*, 1 Dall. 175 (1786).

¹¹ *Cockrill v. Kirkpatrick*, 9 Mo. 688 (1846).

¹² *Marine Bank v. Berney*, 28 Ill. 90 (1862), notwithstanding the custom of Chicago banks to pay depositors in the same depreciated bills in which their deposits were made. See, too, *Springfield Marine, &c., Ins. Co. v. Tinch*er,

or "current bankable funds;"¹ or "any current bank paper or State treasury notes of the State of Texas" to mean Confederate currency.² But it may be shown by parol that "current funds" are equivalent to money.³

Neither is parol evidence admissible to show that it was intended that a note or bill should be paid in work;⁴ or in real estate;⁵ or in Indiana State stock money;⁶ or in railroad notes;⁷ or in debts of other persons;⁸ or in goods;⁹ or that it should be paid in bank notes, notwithstanding it was expressly "to be canceled by a cotton bond."¹⁰ For a consideration of the numerous cases that have arisen under the "scaling" acts and ordinances of some of the Southern States the reader is referred to the chapter on Payment, in a later part of this work.

30 *Ib.* 399 (1863). So, too, when payable in "current funds," *Marc v. Kupper*, 34 Ill. 286 (1864). But it was held in *Pilmer v. Branch Bank*, 16 Iowa 330 (1864), that the parol evidence was admissible to explain an order payable in currency, Dillon, J., saying: "The word 'currency' is far from having a settled, fixed and precise meaning, and even if it had such a meaning in general, it might acquire in certain localities or among certain classes a different signification. * * * We believe, upon examination and contrary to our first impression, that where a note is payable in currency, no rule is violated in receiving evidence of the general and customary meaning of these words at the place where the draft is payable."

¹ *Taylor v. Turley*, 33 Md. 500 (1870); *Turley v. Taylor*, 6 Baxt. 376 (1873).

² *Woods v. Parker*, 36 Tex. 131 (1871).

³ *American Emigrant Co. v. Clark*, 47 Iowa 671 (1878).

⁴ *Bradley v. Anderson*, 5 Vt. 152 (1833).

⁵ *Linville v. Holden*, 2 MacArth. 329 (1876).

⁶ *Burns v. Jenkins*, 8 Ind. 147 (1856).

⁷ *Hair v. La Brouse*, 10 Ala. 548 (1846).

⁸ *Murchie v. Cook*, 1 Ala. 41 (1840).

⁹ *Cox v. Wallace*, 5 Blackf. 199 (1839).

¹⁰ *Cole v. Handley*, 8 Sm. & M. 473 (1847).

IV. ITS CERTAINTY.

A. Certainty as to Amount and Funds.

- 104. Certainty of Amount Payable.
- 105. Marginal Figures—Blanks.
- 106. Designation of Currency—Parol Evidence—Statutes.
- 107. Payment out of Particular Fund.
- 108. Fund Referred to for Re-imbursement.

§ 104. **Certainty of Amount Payable.**—One of the essential elements of negotiable paper is certainty of amount to be paid.¹ An order to pay “the net amount of sales” is not a negotiable bill of exchange;² nor one for “the proceeds” of a shipment of goods “valued about £2,000.”³ In like manner a promise to account for the proceeds of certain notes,⁴ or to pay “whatever you may collect for me from A.,”⁵ is not a negotiable promissory note. So, too, the following instruments have been held to be non-negotiable: an order for payment for “68 bushels of wheat at three cents below first quality wheat;”⁶ a promise to pay £100 “and all fines according to rule;”⁷ or £100 “and all other sums which shall be due him;”⁸ or \$100 “and such additional premiums as may become due” on a certain policy of insurance;⁹ or “deducting all advances and ex-

¹ Byles 95; Chitty 154; 1 Daniel 56; 1 Edwards § 153; 1 Parsons 37; Story on Bills § 42; Story on Prom. Notes § 20; Smith v. Nightingale, 2 Stark. 375; Jones v. Simpson, 2 B. & C. 318; S. C., 3 D. & R. 545; Cushman v. Haynes, 20 Pick. 132 (1838); Fiske v. Witt, 22 *Ib.* 83 (1839); Hasbrook v. Palmer, 2 McLean 10 (1839); Legro v. Staples, 16 Me. 252; Gaar v. Louisville Banking Co., 11 Bush 180 (1874); Matthews v. Redwine, 23 Miss. 233 (1851); Stillwell v. Craig, 58 Mo. 24 (1874).

² Jackson v. Tilghman, 1 Miles 31 (Pa. 1835).

³ Jones v. Simpson, 2 B. & C. 318; S. C., 3 D. & R. 545.

⁴ Fiske v. Witt, 22 Pick. 83 (1839).

⁵ Legro v. Staples, 16 Me. 252 (1839).

⁶ Lent v. Hodgman, 15 Barb. 274 (1853).

⁷ Ayrey v. Fearnside, 4 M. & W. 168. So, if it contains an agreement to pay all taxes that may be levied upon it or upon a collateral mortgage, Farquhar v. Fidelity Ins. Co., 13 Phila. 473 (1878).

⁸ Smith v. Nightingale, 2 Stark. 375; Bolton v. Dugdale, 4 B. & Ad. 619; S. C., 1 N. & M. 412; Firbank v. Bell, 1 B. & Ald. 36.

⁹ Dodge v. Emerson, 34 Me. 96 (1852); Marrett v. Equitable Ins. Co., 54 Me. 537 (1867); Lime Rock Ins. Co. v. Hewett, 60 Me. 407 (1872); Palmer v. Ward, 6 Gray 340 (1856).

penses;”¹ or “first deducting” amount that may be owing from the payee to the maker.² In Iowa, however, a note for \$100 “due for building my mill, subject to diminution by any excess in certain bills of hardware over the original bills,” has been held to be for an amount certain.³

In general the rule requiring certainty as to amount is satisfied if the amount can be ascertained. Thus, “the sum making \$450 on the first day of January next,” is sufficiently certain.⁴ So, too, is a certain sum per acre for a designated tract of land.⁵ And an indorsement on a bond, “Pay the within contents to,” &c., has been held to constitute a good bill of exchange.⁶ And the amount is not rendered uncertain by the addition of such words as “with interest,”⁷ “with current exchange on B.”⁸ Neither is the mere misspelling of the number of dollars, *e. g.* “fife hundret,” “thee hundred,” of any consequence if there is no doubt as to the amount intended.⁹

¹*Cushman v. Haynes*, 20 Pick. 132 (1838). So, a note containing a provision that a smaller amount “if paid January 1st, shall cancel this note,” *Fralick v. Norton*, 2 Mich. 130 (1851).

²*Barlow v. Broadhurst*, 4 Moore 471; *Leeds v. Lancashire*, 2 Campb. 205.

³*Green v. Austin*, 7 Iowa 521 (1859).

⁴*Knight v. Jones*, 21 Mich. 161 (1870).

⁵*Smith v. Clopton*, 4 Tex. 109 (1849).

⁶*Bay v. Freazer*, 1 Bay 66 (1789).

⁷Interest from date being intended, and the fact that the note is only payable after the maker's death being immaterial, *Richards v. Richards*, 2 B. & Ad. 447 (1831); *Roffey v. Greenwell*, 10 Ad. & El. 222 (1839). But a note has been held to be non-negotiable if payable “with interest the same as savings banks pay,” *Whitwell v. Winslow*, 134 Mass. 343 (1883); or in two years with interest, or without interest, if paid within one year, *Lamb v. Story*, 45 Mich. 488 (1881). And it is not sufficiently certain to make a note for the payment of money and also “all counsel fees and expenses in collecting the note if it is sued on or placed in the hands of an attorney for collection,” *First Nat. Bank v. Bynum*, 84 N. C. 24 (1881); or “with ——— per cent. attorney's commissions if collected,” *Johnston v. Speer*, 92 Penna. St. 227 (1879).

⁸*Price v. Teal*, 4 McLean 201 (1847); *Grutacup v. Woulluisse*, 2 *Id.* 581; *Smith v. Kendall*, 9 Mich. 241 (1861); *Leggett v. Jones*, 10 Wis. 34 (1859). So, too, *Bradley v. Lill*, 4 Biss. C. C. 473 (1867), overruling *Lowe v. Bliss*, 24 Ill. 168. The contrary was held in *Russell v. Russell*, 1 MacArth. 263 (1874), where the bill was payable and drawn in the same place. See, also, *contra*, *Lowe v. Bliss*, 24 Ill. 168 (1860); *Philadelphia Bank v. Newkirk*, 2 Miles (Pa.) 442; *Fitzharris v. Leggett*, 10 Mo. App. 527 (1881).

⁹*Ohm v. Yung*, 63 Ind. 432 (1878); *Burnham v. Allen*, 1 Gray 496 (1854) — especially if the amount is correctly given in figures in the margin, as in the latter case.

§ 105. **Marginal Figures—Blanks.**—It is usual and advisable to express the amount in the body of the instrument in words at length, and also in the margin, at top or bottom, in figures. In checks the marginal figure is usually placed at the lower left-hand corner; in notes at the upper left-hand corner; and in bills of exchange at either left-hand corner indifferently. Unless required by statute, the marginal figures are unnecessary,¹ and form no part of the instrument.² They are of service chiefly in aiding an omission or clearing up a doubt.³ Moreover, where the amount is left blank in the body of the instrument, they serve as a restriction upon the holder's authority to fill the blank.⁴ On the other hand, both the existence of a blank and the authority to fill it are sometimes implied from the figures in the margin.⁵ Where the amount in the margin differs from that in the body of

¹Chitty 172; Elliott's Case, 2 East P. C. 951; Sweetser v. French, 13 Metc. 262 (1847).

²Riley v. Dickens, 19 Ill. 30 (1857); Smith v. Smith, 1 R. I. 398 (1850); and it was held in this case that an alteration of the marginal figures was immaterial. And in Hollen v. Davis, 59 Iowa 444 (1882), it was held that there could be no recovery at law on a note containing no other expression of amount than the marginal figures. See, too, Norwich Bank v. Hyde, 13 Conn. 279, in which case Williams, C. J., said: "The aid the margin is to give is to remove an ambiguity in the body of the instrument or to clear up a doubt—not to supply a blank." To the same effect, see Corgan v. Frew, 39 Ill. 31, in which case, however, the marginal figures are declared to be a part of the note. But the number of a bond on the margin is no such part of it that its alteration is material, Commonwealth v. Emigrant Sav. Bank, 98 Mass. 12 (1867).

³Where the marginal figure is plain and the body of the instrument obscure, the amount is a question for the jury, Paine v. Ringold, 43 Mich. 341 (1880).

⁴Boyd v. Brotherson, 10 Wend. 93; Norwich Bank v. Hyde, 13 Conn. 279 (1839); Henderson v. Bondurant, 39 Mo. 369 (1867); Carson v. Hill, 1 McMull. 76. But see, as to alteration of marginal figures and filling blank for a larger amount, Shryver v. Hawkes, 22 Ohio St. 308 (1872); Woolfolk v. Bank of America, 10 Bush 504 (1874); Hall v. Bank of Commonwealth, 5 Dana 258 (1837).

⁵This was held to be so in a case where the marginal figures were "\$334," and the amount in writing "three hundred dollars" with an intervening space, Clute v. Small, 17 Wend. 238 (1837); Boyd v. Brotherson, 10 Wend. 93 (1839), where the writing was only "eight" and the marginal figures "\$800." It being a question of intention for the jury whether the words should be added, Boyd v. Brotherson, *supra*. But see Saunderson v. Piper, 5 Bing. N. C. 425 (1839); S. C., 7 Scott 408, where it was held that evidence of such intention was inadmissible and that the amount written in the body of the instrument could not be enlarged to conform to the marginal figures and stamp. On the other hand, a simple omission, like that of the word "dollars," may be supplied from the marginal figures, Sweetser v. French, 13 Metc 262 (1847).

the instrument, the latter controls.¹ Statutory provision is made in some foreign States for the way in which the amount shall be expressed and for the case of discrepancy between words and figures where both are used.² In the absence of other statutory requirements the amount to be paid may be expressed either in words or in figures.³

¹Chalmer's Dig. 12; Byles 85; Chitty 173; 1 Daniel 94; Saunderson v. Piper, 5 Bing. N. C. 425; S. C., 7 Scott 408; Mears v. Graham, 8 Blackf. 144 (1846); Payne v. Clark, 19 Mo. 152 (1853). But it was otherwise determined on a question of intention in Riley v. Dickens, 19 Ill. 30 (1857).

²The amount to be paid must be expressly stated (Code Napoleon §§ 110, 188) in *Belgium*, *France*, *Greece*, *Haiti*, *Geneva*, *San Domingo* and *Turkey*; also in *Bolivia* (1834 Code Com. Arts. 349, 463, 468 and the amount must be stated either in money or in currency receivable in trade); *Chili* (1865 Code Com. Arts. 632, 633, 765, 766, 771); *Colombia* (1853 Code Com. Art. 517); *Costa Rica* (1853 Code Com. Art. 510); *Germany* (1848 Exch. Law Arts. 4, 96); *Holland* (1838 Exch. Law Arts. 100, 208, 210); *Austria* (1850 Exch. Law Arts. 4, 96); *Hungary* (1860 Exch. Law ch. 1 § 1, as to bills); *Ecuador* (same as *Spain*); *Mexico* (1854 Code Com. Arts. 223, 447); *Nicaragua* (1869 Code Com. Arts. 241, 312, 316); *Honduras*, *Guatemala* and *Paraguay* (177* Orde. Bilbao c. 1 § 2; c. 14 § 1); *Peru* (1853 Code Com. Art. 522, as to drafts and notes); *Portugal* (1833 Code Com. Arts. 321, 426); *Lower Canada* (1867 Civil Code §§ 2280, 2344); *Spain* (1829 Code Com. Art. 563, as to drafts and notes); *Sweden* and *Norway* (1851 Exch. Law ch. 1 § 1); *Switzerland* (Basle 1863 § 3; Berne 1859 § 3); *Venezuela* (1862 Code Com. Art. 1; also Law II. Art. 1). The sum to be paid and the currency in which it is to be paid must be expressed as an essential part of the instrument in the *Argentine Republic* (1862 Code Com. Art. 776); *Brazil* (1850 Code Com. Arts. 354, 426); *Colombia* (1853 Code Com. Art. 384); *Costa Rica* (1853 Code Com. Art. 373); *Peru* (1853 Code Com. Art. 381, in bills of exchange); *Russia* (1832 Exch. Law Art. 541); *Salvador* (1855 Code Com. Arts. 381, 510); *Mexico* (1854 Code Com. Arts. 223, 447); *Spain* (1829 Code Com. Art. 426, in bills of exchange); *Switzerland* (Zurich 1805 § 1, usually in words and figures); *Uruguay* (1865 Code Com. Art. 789); *Venezuela* (1862 Code Com. Art. 1, as to bills). The amount to be paid must be expressed "in letters complete" in *Italy* (1865 Code Com. Art. 196); and "in letters and without abbreviations" in *Peru* (1853 Code Com. Art. 382); and "in the body of the instrument in letters" in *Switzerland* (Basle 1863 § 3; Berne 1859 § 3). The amount to be paid must in a bill of exchange be expressed both in words and figures in *Denmark* (1825 Exch. Law § 7); and in *Russia* (1832 Exch. Law Art. 545). If the amount named in the margin and that in the body differ, the latter controls in the *Argentine Republic* (1862 Code Com. Art. 792); *Brazil* (1850 Code Com. Art. 359); *Chili* (1865 Code Com. Art. 636); *Germany* (1848 Exch. Law Art. 5); *Austria* (1850 Exch. Law Art. 5); *Uruguay* (1865 Code Com. Art. 511). If the words and figures expressing the amount payable differ, the smaller sum governs, unless there is evidence of a contrary intention and an acceptance for the larger sum is at the risk of the acceptor in *Denmark* (1825 Exch. Law § 7). If the amount to be paid, as given several times, varies, whether in words or figures, the smallest sum governs in the *Argentine Republic* (1862 Code Com. Art. 792); *Austria* (1850 Exch. Law Art. 5); *Germany* (1848 Exch. Law Art. 5); *Sweden* and *Norway* (1851 Exch. Law ch. 1 § 4); *Uruguay* (1865 Code Com. Art. 811). The statutes of *Upper Canada* (1859 vol. I p. 230; vol. 2 p. 150) prohibits any bill or stamped, printed or engraved plate for the payment of less than one dollar. In *Norway* domestic bills under one hundred species-thaler are prohibited (1830 Laws p. 414).

³Nugent v. Roland, 12 Mart. O. S. 663 (La. 1823). In this case it was said

If the amount is left blank by the maker, it implies an authority to the holder to fill it with any sum.¹ In England, if stamped paper is used, the authority is limited to the amount warranted by the stamp.² If the amount is left blank by the maker or drawer and the blank filled for an amount greater than was authorized, he will still be liable to a *bona fide* holder for the amount of the instrument as filled in.³

by Martin, J.: "It is certainly very unsafe and may be said improper to state the sum to be paid in a bill or note in figures; but no law avoids a bill or note on that account and authorizes us to allow a person who gives such a bill or note to avail himself of his own wrong and get rid of his obligation." This decision was at once followed by an act providing that "no bill of exchange, promissory note, bank note, draft or check (and, now, all obligations for the payment of money) shall be obligatory or admissible as evidence of a debt unless the sum of money mentioned or specified therein to be due or payable *be expressed in words at full length*," an exception being made in favor of instruments executed out of the State and shown to be in accordance with the law or usages of the place of execution, 1823 P. L. 36. For this exception is now substituted the *proviso*, "unless the same shall be accompanied by proof that it was given for the sum therein expressed. The cents or fractional parts of a dollar may be in figures," 1870 R. S. § 319.

¹Chitty 38; 1 Edwards § 91; 1 Parsons 109; Bank of Commonwealth v. Curry, 2 Dana 142 (1834); Bank of Limestone v. Penick, 5 T. B. Mon. 25 (1827); Hall v. Bank of Commonwealth, 5 Dana 258 (1837); Fullerton v. Sturges, 4 Ohio St. 529 (1855); Frazier v. Gains, 2 Baxt. 92 (1872); McArthur v. McLeod, 6 Jones 475 (1859). For authority to fill blanks in general, see Chap. VI. But where the amount to be paid depends on the place of payment to be designated by indorsement on a corporation bond, the blank place in the indorsement cannot be filled without special authority, Parson v. Jackson, 9 Otto 434 (1878). So, too, a blank for attorney's commissions, without which the amount payable is uncertain and the note non-negotiable, Johnston v. Speer, 92 Penna. St. 227 (1879).

²Chitty 38; Collis v. Emmett, 1 H. Bl. 313; Russell v. Langstaffe, Dougl. 496; Snaith v. Mingay, 1 M. & S. 87; Crutchley v. Mann, 5 Taunt. 529; S. C., 1 Marsh. 29; Crutchley v. Clarence, 2 M. & S. 90; Pasmore v. North, 15 East 517.

³1 Daniel 145; 1 Parsons 33, 109; Collis v. Emmett, 1 H. Bl. 313; Russell v. Langstaffe, 2 Dougl. 514; Snaith v. Mingay, 1 M. & S. 87; Leslie v. Hastings, 1 Man. & Ry. 119; Molloy v. Delves, 7 Bing. 428; S. C., 5 M. & P. 275; S. C., 4 C. & P. 492; Barker v. Stearn, 9 Exch. 684; Bank of Commonwealth v. Curry, 2 Dana 142 (1834); Hall v. Bank of Commonwealth, 5 *Ib.* 258 (1837); Van Duzer v. Howe, 21 N. Y. 351 (1860); Herbert v. Huie, 1 Ala. 18 (1840); Huntington v. Bank of Mobile, 3 *Ib.* 186 (1841); Decatur Bank v. Spence, 9 *Ib.* 800 (1846); Chemung Canal Bank v. Bradner, 44 N. Y. 680 (1871); Johns v. Harrison, 20 Ind. 317 (1863); Wilson v. Kinsey, 49 *Ib.* 35 (1874); McArthur v. McLeod, 6 Jones L. 475 (1859); Frazier v. Gains, *supra*; Putnam v. Sullivan, 4 Mass. 45; Abbott v. Rose, 62 Me. 194 (1873); Smith v. Lockridge, 8 Bush 423 (1871); Jones v. Shelbyville Ins. Co., 1 Metc. 58 (Ky. 1858); Bank of Limestone v. Penick, *supra*; Young v. Ward, 21 Ill. 223 (1859); Nichol v. Bate, 10 Yerg. 429 (1837); Waldron v. Young, 9 Heisk. 777 (1872); Joseph v. National Bank, 17 Kans. 256 (1876). And in like case a surety is held where the maker fills the blank contrary to his verbal agreement with the surety, Gothrupt v. William

§ 106. **Designation of Currency—Parol Evidence—Statutes.**—The amount to be paid may be designated in any currency of ascertainable or known value. For the meaning of such words as “sterling,” “currency,” “dollars,” &c., the reader is referred to another part of this work.¹ Where such words as “pounds,” “shillings,” “dollars,” are altogether omitted, the instrument will not be vitiated if the meaning is unmistakable.² And an amount that has been made too large by mistake may be corrected, or the mistake may be set up in defense, between the original parties.³ But parol evidence is inadmissible, as in other cases, to vary the instrument by showing that a different amount was agreed upon, except in cases of fraud and mistake. Thus, if a note be given for \$100, the price of goods purchased, it cannot be shown in defense that a different price was agreed upon;⁴ or if for the hire of a certain negro, that the wages were to be higher if cotton sold for \$300 per hundred weight.⁵

It is required by statute of many States, as well as by the common law, that the amount to be paid shall be cer-

son, 61 Ind. 599 (1878). So, an indorser before delivery is liable to a holder for value without notice for a blank filled in excess of his authority, *Diercks v. Roberts*, 13 So. Car. 338 (1879). Leaving blanks, however, for payee's name and amount gives no authority to add “from maturity” to a complete interest clause; and such an addition is material and discharges the maker, *Coburn v. Webb*, 56 Ind. 96 (1877). As to liability for blanks negligently left and fraudulently filled, as well as liability to holders with notice, see Chap. VI.

¹See Section III. of this chapter. A note for “500 pounds sterling money of the United Kingdom of Great Britain and Ireland,” is negotiable, *King v. Hamilton*, 12 Fed. Rep. 478 (1882).

²Byles 86; *Elliot's Case*, 2 East P. C. 951; S. C., 1 Leach 175; *Phipps v. Tanner*, 5 C. & P. 488; *Williamson v. Smith*, 1 Coldw. 1 (1860); *Booth v. Wallace*, 2 Root 247 (1795); *Harman v. Howe*, 27 Gratt. 677 (1876); *McCoy v. Gilmore*, 7 Ohio 268 (1835); *Grant v. Brotherton*, 7 Mo. 458 (1842); *Morrill v. Handy*, 17 Mo. 406 (1853); *Coolbroth v. Purinton*, 29 Me. 469 (1849); *Northrop v. Sanborn*, 22 Vt. 433 (1850); *Corgan v. Frew*, 37 Ill. 31 (1865); *Beardsley v. Hill*, 61 Ill. 354 (1871); *Petty v. Fleishel*, 31 Tex. 169 (1868); *Ohm v. Yung*, 63 Ind. 432 (1878). See, *contra*, *Brown v. Bebee*, 1 D. Chip. 227 (Vt. 1814).

³*Claxon v. Demaree*, 14 Bush 172 (1878). So, where an agreement to refund on certain contingency was omitted by fraud, *Coger v. McGee*, 2 Bibb 321. So, where it is given for a nominal premium to cover risks that may be afterward indorsed, *Maine Mut. Ins. v. Stockwell*, 67 Me. 382 (1877).

⁴*Downs v. Webster*, Brayt. 79 (Vt. 1820).

⁵*Gazaway v. Moore*, Harper 401 (1824).

tain.¹ The amount for which a bill or note may be issued is in general left unrestricted by statute. In Great Britain certain restrictions exist as to notes and bills under twenty shillings, and bank notes and other notes to bearer under five pounds.² A similar restriction still exists in South Carolina as to bills and notes under one dollar.³

§ 107. **Payment Out of Particular Fund.**—As we have seen, the commercial character of an instrument depends upon its being a contract for unconditional payment. From this follows the rule that it must not be made payable out of any particular fund, and if made so payable, its negotiability is destroyed thereby.⁴

¹In *California* negotiable instruments must be "for the payment of a certain sum of money" (Civ. Code of 1872 § 8087). In *Dakota* the same provision has been enacted (Rev. Code 1877 § 1821). In *Georgia* a promissory note must be for "a specified amount of money or other articles of value" (Code 1873 § 2774). And in *Idaho* for "a sum of money therein mentioned" (Rev. L. 1875 p. 652 § 1). In *Kansas* negotiable notes and bills must be "for a sum or sums of money certain" (Comp. L. 1879 c. 14 § 1). In *Louisiana* the amount may be expressed in figures only, but in such case there can be no recovery without evidence to support the instrument (1855 P. L. p. 47; C. C. § 2243). In *Michigan* promissory notes for the payment of a "sum of money therein mentioned" are made negotiable (1 Comp. L. 1871 p. 515 § 1). In *Nebraska* negotiable instruments must be for a "sum or sums of money certain" (1873 G. S. c. 32 § 1; 1866 R. S. c. 27). In *Nevada* negotiable notes must be for "a sum of money therein mentioned" (1 Comp. L. 1873 c. 5 § 9; 1861 P. L. p. 4). So, in *New Jersey* (1795 Pat. Rev. p. 342 § 4; 1874 Rev. p. 897 § 1). So, in *New York* (2 R. S., Ed. 1875, p. 1160 § 2; 1 R. L. 1801 p. 151). In *Ohio* for a "sum or sums of money certain" (1880 R. S. §§ 3171; 1880 P. L. p. 217 § 1). In *Oregon* as in *New York* (1872 G. L. p. 718 c. 48 § 2). In *Wisconsin* likewise (1878 R. S. § 1675).

²By 48 Geo. III. c. 88 § 2, negotiable bills, notes and checks for less than 20s. are made void, and by § 3 a penalty is imposed for issuing or negotiating them. But by 23 and 24 Vict. c. 111 § 19, checks for less than 20 shillings are made lawful. Bills and notes for less than £5 and over 20s. were regulated by 17 Geo. III. c. 30; but this act was suspended except as to notes payable to bearer on demand by 26 and 27 Vict. c. 105, and the suspension is continued by 39 and 40 Vict. c. 69. There are no restrictions as to amount in respect of non-negotiable bills and notes," Chalmer's Dig. 11. Bank notes under £5 have been prohibited in England since 1829 by 7 Geo. IV. c. 6 § 3. And in 1831 the act of 9 Geo. IV. c. 65, prohibited the issue or negotiation in England of any note for less than £5 payable to bearer on demand, made or issued or purporting to be made or issued "in Scotland or Ireland or elsewhere out of England."

³In South Carolina bills and notes to order or bearer for any sum under one dollar are void, and the passing of such bills is subjected to a penalty (1873 R. S. 320 § 21; 1816 P. L. p. 34 § 1).

⁴Byles 98; Chitty 159; 1 Daniel 53; 1 Edwards § 157; 1 Parsons 43; Story on Bills § 46; Jenny v. Herle, 2 Ld. Raym. 1361; S. C., 8 Mod. 265; S. C., 1 Stra. 591; Haydock v. Lynch, 2 Ld. Raym. 1553; Dawkes v. De Loraine, 2 W. Bl. 782; S. C., 3 Wils. 207; Yates v. Grove, 1 Ves. 280; Stevens v. Hill,

Thus a bill or note is payable out of a particular fund and therefore not negotiable, if payable out of the proceeds of certain bonds or drafts,¹ or other personal property;² or on account of cotton consigned, with a promise to pay out of the proceeds.³ So, too, if "on account of brick work done" on a certain building,⁴ or of freight to be earned;⁵ or an order on a State Treasurer by the public printer to pay "out of any moneys in your hands due me for printing;"⁶ or on the Postmaster General by a mail contractor, with the words "and charge the same to my account for transferring the United States mail;"⁷ or by a private contractor, with the

5 Esp. 247; *Carlos v. Fancourt*, 5 T. R. 482; *Waters v. Carleton*, 4 Porter 205 (1836); *Gliddon v. McKinstry*, 28 Ala. 408 (1856); *West v. Foreman*, 21 *Ib.* 400; *Wilamouicz v. Adams*, 13 Ark. 12 (1852); *Owen v. Lavine*, 14 Ark. 389 (1854); *Hamilton v. Myrick*, 3 *Ib.* 541 (1841); *Mills v. Kuykendall*, 2 Blackf. 47 (1827); *Strader v. Batchelor*, 8 B. Mon. 168 (1847); *Turner v. Peoria, &c., R. R. Co.*, 95 Ill. 134 (1880); *Second Nat. Bank v. Lansing*, 1 Brown 181 (1870); *Van Vacter v. Flack*, 1 Sm. & M. 393 (1843); *Wadlington v. Covert*, 51 Miss. 631 (1875); *Harriman v. Sanborn*, 43 N. H. 128 (1861); *Smith v. Wood*, Saxt. 90 (1830); *Herbert v. Tuthill's Exr.*, *Ib.* 147 (1830); *Rice v. Porter's Admr.*, 1 Harr. 440 (N. J. 1838); *Atkinson v. Manks*, 1 Cow. 691, 707 (1823); *Cook v. Satterlee*, 6 *Ib.* 108 (1826); *Worden v. Dodge*, 4 Den. 159 (1847); *Van Wagner v. Terrett*, 27 Barb. 181 (1858); *Tradesman's Nat. Bank v. Green*, 57 Md. 602 (1881); *Burch v. Newberry*, 1 Barb. 648 (1847); *Sheffield School v. Andress*, 56 Ind. 157 (1877); *Kinney v. Lee*, 10 Tex. 155 (1853); *Andrews v. Harvey*, 39 Tex. 123 (1873); *Averett's Admr. v. Booker*, 15 Gratt. 163 (1859); *Jackman v. Bowker*, 4 Metc. 235 (1842); *Raiguel v. Ayliff*, 16 Ark. 594 (1855); *Blevins v. Blevins*, 4 *Ib.* 441 (1842); *Cota v. Buck*, 7 Metc. 589 (1844); *Carlisle v. Dubree*, 3 J. J. Marsh. 542 (1830); *Reeside v. Knox*, 2 Whart. 233 (1837); *Dyer v. Covington Township*, 19 Penna. St. 200 (1852); *Nichol's Admr. v. Davis*, 1 Bibb 490 (1809); *Smurr v. Forman*, 1 Ohio 273 (1824); *Kelly v. Bronson*, 26 Minn. 357 (1880); *Curle v. Beers*, 3 J. J. Marsh. 170 (1830); *Wiggins v. Vaught*, Cheves 92 (1840).

¹ *Kenney v. Hinds*, 44 How. Pr. 7 (1871); *Raiguel v. Ayliff*, 16 Ark. 594 (1855); *Brill v. Hoile*, 53 Wis. 537 (1881).

² *Worden v. Dodge*, 4 Den. 159 (1847); *Atkinson v. Manks*, 1 Cow. 691, 707 (1823); *Curle v. Beers*, 3 J. J. Marsh. 170 (1830); *Owen v. Lavine*, 14 Ark. 389 (1854).

³ *Lowery v. Steward*, 25 N. Y. 239 (1862), such order amounting in equity to an assignment of the cotton.

⁴ *Pitman v. Breckenridge*, 3 Gratt. 121 (1846). But see *Ex parte Shellard*, 22 W. R. 152, where an order, payable out of moneys which would become due the drawers on the completion of a certain contract, was held to operate as a bill of exchange and require a stamp as such.

⁵ *Byles* 98; *Banbury v. Lissett*, 2 Stra. 1211. But a like order from the freighter was held to be a good bill, being equivalent to an admission that the money was due, *Pierson v. Dunlop*, Cowp. 571.

⁶ *Wilamouicz v. Adams*, *supra*. So, *Stebbins v. Union Pacific R. R.*, 2 Wy. 71 (1879).

⁷ *Reeside v. Knox*, 2 Whart. 233 (1837).

words "and charge the same to my account of grading, &c., as per contract;"¹ or an order payable to A. B., "if the same be due him from me, on his and my settlement, out of the last payment due on the houses which I am now building for you;"² or out of money due for work to be done, which never was done.³ So, too, if payable out of one's growing subsistence;⁴ or "out of my part of the estate;"⁵ or "as soon as I am in possession of funds from the estate of B.;"⁶ or "on account of my share of rent which will be due June 1st;"⁷ or a simple order for the payment of rents.⁸ So, too, an order payable out of moneys to be collected by an attorney, on whom the draft is made;⁹ or "out of the demand I have against the estate of A.;"¹⁰ or an order on a sheriff, "out of 12 bales of cotton attached by you;"¹¹ or an order on a partner, with the words "and deduct the same from my share of the profits of the partnership;"¹² or, in general, "out of any money in your hands belonging to me;"¹³ or by an army officer on a regimental paymaster for

¹ *Ehrichs v. De Mill*, 75 N. Y. 370 (1878).

² *Jackman v. Bowker*, 4 Metc. 235 (1842).

³ *Crowell v. Plant*, 53 Mo. 145 (1873).

⁴ *Josselyn v. Lacier*, 10 Mod. 294; *Russell v. Powell*, 14 M. & W. 418, where the fund referred to was part of a residuary share of an estate payable to the drawer's order by virtue of an order in Chancery.

⁵ *Mills v. Kuykendall*, 2 Blackf. 47 (1827); *Herbert v. Tuthill's Exr.*, Saxt. 147 (1830).

⁶ *Wiggins v. Vaught*, Cheves 91 (1840).

⁷ *Rice v. Porter's Admr.*, 1 Harr. 440 (N. J. 1838).

⁸ *Morton v. Naylor*, 1 Hill 583 (1841).

⁹ *Nichol's Admr. v. Davis*, 1 Bibb 490 (1809); *Hamilton v. Myrick*, 3 Ark. 541 (1841); *Blevins v. Blevins*, 4 Ark. 441 (1842); *Glidden v. McKinstry*, 28 Ala. 408 (1856); *Shields v. Taylor*, 25 Miss. 13 (1852); *Van Vacter v. Flack*, 1 Sm. & M. 393 (1843); *Waters v. Carleton*, 4 Porter 205 (1836); *Crawford v. Cully*, Wright 453 (Ohio 1833). But such a note has been held not to be payable out of a particular fund where made payable "as soon as the amount can be collected out of the contract, and if not so collected, in four years," *Smith v. Ellis*, 29 Me. 422 (1849).

¹⁰ *West v. Foreman*, 21 Ala. 400 (1852).

¹¹ *Wadlington v. Covert*, 51 Miss. 631 (1875).

¹² *Munger v. Shannon*, 61 N. Y. 251 (1874). But a note promising to pay "forty dollars *profits*" has been held to be negotiable, parol evidence not being admitted to show that the word imputed a contingency, *Matthews v. Crosby*, 56 N. H. 21 (1875). And to the same effect, see *Sears v. Wright*, 24 Me. 278 (1844).

¹³ *Averett's Admr. v. Booker*, 15 Gratt. 163 (1859); *Lee, J.*, distinguishing this case from *Joliffe v. Higgins*, 6 Munf. 3, where the order for payment

his pay;¹ or an order, with the words "being the amount that came to you from B. for me, and this shall be your warrant for so doing and good as my receipt of said money."²

On the other hand, the following instruments have been held not to be payable out of a particular fund and to be negotiable, viz.: "out of any property I may possess;"³ "out of my separate property and estate;"⁴ "out of any funds not before specifically appropriated;"⁵ "as soon and as fast as the money can be collected;"⁶ or one month after a certain life insurance policy becomes due.⁷ So, a draft in general terms by the Secretary of the Treasury for money, which was payable by treaty with France.⁸ So, too, a draft payable "on account of moneys advanced by me for the S. & F. Company."⁹

§ 108. **Fund Referred to for Re-imbursement.**—Moreover, a fund is often referred to in a bill of exchange to indicate the means of re-imbursement to the drawee. The negotiable character of the bill is not prejudiced by any such mention of a fund for re-imbursement.¹⁰ The following phrases have

of a sum certain, which was "lodged in the hands" of the drawee and "was the property of" the payee, was held to be a good bill not payable out of a particular fund.

¹Smurr v. Forman, 1 Ohio 272 (1824).

²Harriman v. Sanborn, 43 N. H. 128 (1861), this paper being without the words "value received" and plainly intended for a mere receipt.

³Chickering v. Greenleaf, 6 N. H. 51 (1832). So, the note of an incorporated bank "payable out of the joint funds thereof and no other," United States v. Smith, 2 Cranch C. C. 111.

⁴Skillen v. Richmond, 48 Barb. 428 (1867).

⁵Bull v. Sims, 23 N. Y. 570 (1861). But see, *contra*, Matthis v. Town of Cameron, 62 Mo. 504 (1876).

⁶Smith v. Ellis, 29 Me. 422 (1849).

⁷Herriman v. McKee, 49 Iowa 185 (1878).

⁸Bank of the United States v. The United States, 2 How. 711, 734 (1844).

⁹Griffin v. Weatherly, L. R. 3 Q. B. 753 (1868). "It is objected," said Mr. Justice Leech, "that it is not a bill because it orders payment out of a particular fund by reason of the words 'on account of moneys advanced by me for the Isle of Man Slate Company;' but that appears to me merely to denote the consideration for the order, and is merely an equivalent phrase to 'value received.' If the defendant had accepted generally, would he not have been absolutely bound to pay on the first of August, whether he had funds of the company in his hands or not? Most assuredly, as it seems to me, he would. Therefore this is a bill of exchange."

¹⁰Byles § 98; Chitty 169; 1 Daniel 55; 1 Edwards § 158; 1 Parsons 44; Story on Prom. Notes § 26; Kelley v. Brooklyn, 4 Hill 263 (N. Y. 1843); Bank

been held to amount to nothing more than that, viz.: "and charge to my salary account;"¹ "and charge the same to apply on contract for building;"² "and charge to Bedford Road assessment;"³ "out of my share of the grain;"⁴ "and charge the same against whatever amount may be due me for my share of fish;"⁵ "and I will credit your note to me for the amount."⁶ And this is true generally of bills drawn against shipments of goods, whether accompanied by the bills of lading or not.⁷ For phrases making mention of securities or particularizing the consideration, the reader is referred to a later chapter of this work.

of *Kentucky v. Sanders*, 3 A. K. Marsh. 104 (1820); *Smith v. Ellis*, 29 Me. 422 (1849); *Coursin v. Ledlie's Admr.*, 31 Penna. St. 506 (1858); *Matthews v. Crosby*, 56 N. H. 21; *MacLeod v. Snee*, 2 Stra. 762; *Early v. McCart*, 2 Dana 414; *Sears v. Wright*, 24 Me. 278 (1844); *Corbett v. Clark*, 45 Wis. 403 (1878); *Hollister v. Hopkins*, 13 Hun 210.

¹*Shaver v. West. Un. Tel. Co.*, 57 N. Y. 459 (1874); *MacLeod v. Snee*, *supra*. But a similar order by a judge upon the State Treasurer concluding "and charge the same to account of my salary as judge," was held not to be a negotiable bill of exchange in *Strader v. Batchelor*, 8 B. Mon. 168 (1847).

²*Hollister v. Hopkins*, 13 Hun 210 (1878). So, *Carran v. Little*, 40 Ohio St. 397 (1884); 18 Cent. L. J. 118.

³*Kelley v. Brooklyn*, 4 Hill 263.

⁴*Corbett v. Clark*, 45 Wis. 403 (1878).

⁵*Redman v. Adams*, 51 Me. 429 (1863).

⁶*Early v. McCart*, 2 Dana 414 (1834).

⁷*Cowperthwaite v. Sheffield*, 1 Sandf. 416 (1849), affirmed 3 N. Y. 243; *Lowery v. Steward*, 3 Bosw. 505 (1858).

B. Certainty as to Time of Payment.

109. Certainty—In General.
110. Indefinite Expressions—Blanks—Omissions.
111. Payment Conditional—"When Able"—"When in Funds."
112. Payable "when Realized from Sales"—"When Collected."
113. on Death—Marriage—Coming of Age.
114. in Installments—On Default of Interest.
115. on Return of Papers—Completion of Building—Settlement of Accounts—Arrival of Ship.
116. on Public Event—Wager.
117. "on Demand."
118. on Demand—Equivalent Expressions.
119. if no Time Expressed.
120. Time of Payment—Memorandum—Parol Evidence.

§ 109. **Certainty—In General.**—A negotiable bill of exchange, promissory note or check must be payable at a time certain. In many countries it is required by statute that the time be expressed in the instrument.¹ It is also required by

¹Expression of the time of payment is essential by statute in the *Argentine Republic* (1862 Code Com. Arts. 776, 916); *Austria* (1850 Exch. Law Arts. 4, 96); *Belgium* (see Code Napoleon § 110, and as to notes § 188); *Bolivia* (1834 Code Com. Arts. 362, 365, 463, 469, and if no time be expressed the bill is payable at sight, Art. 465); *Brazil* (1850 Code Com. Arts. 354, 426); *Chili* (1865 Code Com. Arts. 633, 771—but notes may be without expressed time of payment and are then payable ten days after date, Art. 778); *Colombia* (1853 Code Com. Arts. 384, 517, and if no time be expressed in a note, it is payable ten days after date, Art. 515); *Costa Rica* (1853 Code Com. Arts. 373, 510, and if no time be expressed in a note, it is payable ten days after date, Art. 508); *Denmark* (1825 Exch. Law § 8); *Ecuador* (see Spain); *France* (Code Napoleon §§ 110, 188); *Geneva* (Code Napoleon); *Germany* (1848 Gen. Exch. Law Arts. 4, 96); *Greece* (Code Napoleon); *Guatemala* (see Paraguay); *Haiti* (Code Napoleon); *Holland* (1838 Exch. Law Arts. 100, 208, as to bills of exchange, but not as to notes); *Honduras* (see Paraguay); *Hungary* (1860 Exch. Law ch. 1 §§ 1, 14); *Italy* (1865 Code Com. Arts. 196, 273); *Mexico* (1854 Code Com. Arts. 223, 447); *Nicaragua* (1869 Code Com. Arts. 241, 312); *Paraguay* (Orde. Bilbao 1774 ch. 1 § 2; ch. 14 § 1); *Peru* (1853 Code Com. Arts. 381, 522—but notes and certificates of deposit are payable ten days after date, if no time be expressed, Art. 520); *Portugal* (1833 Code Com. Arts. 321, 426); *Russia* (Exch. L. 1832 Art. 541); *Salvador* (1855 Code Com. Arts. 381, 510); *San Domingo* (Code Napoleon); *Spain* (1829 Code Com. Arts. 426, 563, and if no time be expressed in a note, it is payable ten days after date, Art. 561); *Sweden and Norway* (1851 Code Com. ch. 1 § 1); *Switzerland* (1805 Zurich; 1859 Berne; 1863 Basle); *Turkey* (Code Napoleon); *Uruguay* (1865 Code Com. Art. 789, but drafts are payable at sight, if no time be expressed); *Venezuela* (1862 Code Com. Art. 1; Law II. Art. 1). By the Civil Code of *Lower Canada* (A. D. 1867 §§ 2283, 2346) bills and notes are payable on demand, if no time be expressed. And in the *Argentine Republic* bills are payable at sight, if no time be expressed (Code Com. Art. 786). If no time of payment be expressed, the bill or note is wholly void as a commercial instrument by the Code Napoleon, Bedarride's *Droit Commercial*, vol. 1 p. 108, vol. 2 p. 392; but it may be payable on demand, *Ib.* In such case the phrases *a volonte*—*a presentation*—*toutes fois et quand*—are commonly used as equivalent to the English "on demand." An express time of payment

some foreign statutes that such instruments be made payable on certain days or within a certain limit of time.¹ And it was formerly required by English statute that all negotiable bills or notes under £5 should be made payable within twenty-one days from their date.² In the United States there are but few statutory regulations on the subject.³ In the absence of statute it is both customary and advisable to express the time of payment in the instrument. Usually

is also indispensable in *Germany*, Thöl W. R. 151; and in *Italy* a certain fixed day must be named for the payment of notes which are payable in produce (1865 Code Com. Art. 278).

¹ By the Code Napoleon (§ 129) a bill of exchange may be made payable at sight or at one or more days, months or usances after sight or date, or on a fixed day or at a fair. This is the law in *Belgium*, *France*, *Geneva*, *Greece*, *Haiti*, *San Domingo*, and *Turkey*. Likewise in *Spain* (1829 Code Com. Art. 439); *Costa Rica* (1853 Code Com. Art. 386); *Hungary* (1860 Exch. Law ch. 1 § 89); *Ecuador* (Spanish Code); *Mexico* (1854 Code Com. Art. 334); *Nicaragua* (1869 Code Com. Art. 250); *Portugal* (1833 Code Com. Arts. 321, 372). So, in *Peru* (1853 Code Com. Art. 399); *Salvador* (1855 Code Com. Art. 394); *Colombia* (1853 Code Com. Art. 397) except as to usances; *Germany* (1848 Exch. Law Art. 4), and in *Germany* a bill or note cannot be paid in installments (Arts. 4, 96) by the law of 1861. In *Sweden* and *Norway* (1851 Exch. Law ch. 1 § 3) bills may be made payable at sight or on a fixed day or a certain day after sight or date. So, in *Switzerland* (Berne 1859 § 4; Basle 1863 § 3) or at a fair. Bills and notes may be made payable at sight or on demand, certain days or months after sight or after date, or on a fixed day in the *Argentine Republic* (1862 Cod. Com. Arts. 786, 917). In *Holland* bills may be made payable at or after sight or at a time certain (1833 Exch. Law Art. 100). In *Nicaragua* (1869 Code Com. Art. 312) all drafts are payable at sight, unless expressly payable on a fixed day or a certain time from date, but they cannot be made payable a certain time after sight. In *Denmark* (1825 Exch. Law §§ 8, 9) a bill may be made payable at sight or a certain time after sight or date, or on a fixed day, but must be payable within three months, if drawn in *Denmark*—four months, if in the *Faro Island*—six months, if in *Iceland* or the *West Indies*—one year, if in *Guinea*—and by the act of 1843 all bills drawn by the drawer on himself must be payable within three months. In *Uruguay* (1865 Code Com. Art. 805) drafts may be made payable at sight, or on a fixed day, or a certain time after sight or date. So, in *Venezuela* (1862 Code Com. Art. 16) as to bills.

² 17 Geo. III. c. 30, now repealed. And it is said, "if a bill of exchange be made payable at never so distant a day, if it be a day that must come, it is no objection to the bill," Willes, C. J., in *Colehan v. Cooke*, Willes 396.

³ In *California* "a negotiable instrument may be with or without designation of the time of payment" (Civ. Code 1872 § 8091), and one "which does not specify the time of payment, is payable immediately" (*Id.* § 8099). In *Dakota* the above-mentioned provisions of the California Code have been enacted (Rev. Code 1877 §§ 1825, 1830). In *Georgia* promissory notes must be made for payment "at a specified time" (Code 1873 § 2774). In *Minnesota* the time fixed by statute as "reasonable" for a demand to hold an indorser on a note payable "on demand" is sixty days (1878 G. S. c. 23 §§ 11, 12). Notes payable on demand are not entitled to grace (*Id.* § 18). In *New Hampshire* the provision as to "reasonable time" in the case of demand notes is the same as that of *Minnesota* (1878 G. L. c. 220 § 11).

this time is either expressed to be "on demand" or in a designated number of days or months after date. Bills of exchange are also frequently made payable "at sight" or a certain number of days "after sight." This means in the case of a bill of exchange at or after acceptance or protest for non-acceptance.¹ In the case of a promissory note it seems to be equivalent to "demand."² In England it is now by statute equivalent in both cases to "demand."³

Where a time of payment is expressed in a negotiable instrument, it becomes a material part of the contract. In such case it must be averred in the pleading and its omission will constitute a fatal variance.⁴ And a subsequent readiness to pay is no defense to an action on such an instrument.⁵

§ 110. **Indefinite Expressions—Blanks—Omissions.**—Where a bill or note is for the payment of money "by" November 1st, it is due *on* that day.⁶ So, if payable "on or by" such a day;⁷ or "on or before" a day named.⁸ And where an instrument was payable "on" a day certain, a description

¹ Byles 81. "It must be presented for acceptance and the time of the bill begins to run not from the mere presentment, but from the presentment and acceptance," Story, J., in *Mitchell v. Degrand*, 1 Mason 181 (1817).

² Byles 81; *Holmes v. Kerrison*, 2 Taunt. 323; *Sutton v. Toomer*, 7 B. & C. 416; S. C., 1 M. & Ry. 125. At least it does not mean on or after *date* *Sturdy v. Henderson*, 4 B. & Ald. 592 (1821). "On demand, at sight" is said by Bolland, B., to mean "if you demand it and show it," *Dixon v. Nuttall*, 6 C. & P. 320 (1834); S. C., 1 Crompt. M. & R. 307.

³ 34 and 35 Vict. c. 74.

⁴ *Sebree v. Dorr*, 9 Wheat. 558 (1824).

⁵ *McCreary v. Newberry*, 25 Ill. 496 (1861).

⁶ *Preston v. Dunham*, 52 Ala. 217 (1875).

⁷ *Massie v. Belford*, 68 Ill. 290 (1873).

⁸ *Bates v. Leclair*, 49 Vt. 229 (1877); *Jordan v. Tate*, 19 Ohio St. 586 (1869); *Mattison v. Marks*, 31 Mich. 421 (1875); *Helmer v. Krolick*, 36 Mich. 371 (1877), in which case a note payable "on or before three years from date," was held not to mature until the end of the three years. A note payable "on or before the first day of May next," is negotiable, *Curtis v. Horn*, 58 N. H. 504 (1878). And the same has been held in Pennsylvania of a note payable on a day certain "or before if made out of the sale" of a machine, *Ernst v. Steckman*, 74 Penna. St. 13. But see *contra*, *Charlton v. Reed*, 61 Iowa 166 (1883). The following also have been held non-negotiable: A note payable "on demand or in three years," with interest during said term, "or for such further time as said principal or any part thereof shall remain unpaid," *Mahoney v. Fitzpatrick*, 133 Mass. 151 (1882); a note payable "on or before two years from date," without interest if paid within one

of it in the pleadings as payable "on or before" that day, was held to be sufficient.¹ But a bill or note payable on a day certain "or at any time before maturity" is not negotiable for want of sufficient certainty.² And an agreement indorsed on a promissory note to pay it "in any time within six years," does not extend the Statute of Limitations, but it will commence to run from the date of the agreement.³

Sometimes the time of payment is left blank with the intention that it shall be afterwards filled up by the holder. As we have already seen, authority to any *bona fide* holder to fill such blank is inferred by law from the delivery of the instrument with the blank.⁴ But where this authority is not coupled with an interest, it cannot be exercised after the drawer's death.⁵ Often the blank left is a mere accidental omission of some simple word, *e. g.* "day," "year," "month," "date," which can be readily supplied.⁶ In all such cases, where the omission and intention are perfectly plain, recovery can be had on the instrument without insertion of the word or words omitted. And a similar omission in the pleading, whereby a note payable three months after date is

year, *Lamb v. Story*, 45 Mich. 488 (1881); a note payable "on or before four years," with interest payable annually if convenient, *Humphrey v. Beckwith*, 48 *Ib.* 151 (1882).

¹ *Morton v. Tenny*, 16 Ill. 494 (1855).

² *Hubbard v. Mosely*, 11 Gray 170 (1858); *Way v. Smith*, 111 Mass. 523 (1873), *Morton, J.*, saying: "This stipulation gives the maker the right to pay the note at any time before its maturity at his option, and such payment would discharge his contract. It renders the contract uncertain and contingent both as to the time of payment and the amount to be paid, and is inconsistent with the essential character of a negotiable promissory note." So, too, *Stults v. Silva*, 119 Mass. 137 (1875).

³ *Young v. Weston*, 39 Me. 492 (1855).

⁴ *McGrath v. Clark*, 56 N. Y. 34 (1874); *Fullerton v. Sturges*, 4 Ohio St. 529 (1855); *Witte v. Williams*, 8 So. Car. 290 (1875); *Michigan Ins. Co. v. Leavenworth*, 30 Vt. 11 (1856).

⁵ *Michigan Ins. Co. v. Leavenworth*, *supra*.

⁶ Payable "in the (year) of our Lord, &c.," *Hunt v. Adams*, 6 Mass. 519 (1810); "four months after (date)," *Pearson v. Stoddard*, 9 Gray 199 (1857); "six (months) after date," *Conner v. Routh*, 7 How. 176 (Miss. 1843); *Nichols v. Frothingham*, 45 Me. 220 (1858); "ninety (days) after date," *Deshon v. Leffler*, 7 Mo. App. 595 (1879); *Boykin v. Bank of Mobile*, 72 Ala. 262 (1882). But parol evidence was held inadmissible to show the intention and clear up the meaning of a note payable "in one from the first of October, in cattle or in grain the first of January following," *Wainwright v. Straw*, 15 Vt. 215 (1843).

described as payable "three from date," is immaterial, especially where the declaration goes on to recite that "the said three months have elapsed."¹

It seems that where a note dated in December is made payable on a certain day in "December next," it may be shown by parol that December *instant* was intended.² So, if payable "on the 6-9 Jan.," the usage of indicating the days of grace in this manner may be shown by parol.³ And even such a phrase as "when the lumber is run to market" has been held capable of explanation by parol.⁴

When the time of payment is so wholly uncertain as not to be ascertainable from the instrument, its negotiable character is thereby lost.⁵ The ambiguity, however, is often more apparent than real and is in such cases capable of construction by the court without prejudice to the negotiability of the paper. Thus, a bill of exchange in these words, "On the thirty-first of October pay, &c., * * * payable in Paris, December thirty-first," and dated at New York, was held to be payable at option in Paris, in December, or in New York, in October, or else the provision for payment in October was to be rejected as surplusage.⁶ A note payable "in good notes which is to be due in eighteen months" is for immediate payment in notes of that description.⁷ A note dated July 20th and payable "one year, August 15th, after date," is due in one year from the fifteenth day of August after its date.⁸ In general a note which is not dated, and is made payable a given time after date, is to be considered as

¹ *Passumpsic Bank v. Goss*, 31 Vt. 315 (1858).

² *McCrary v. Caskey*, 27 Ga. 54 (1859). But see *contra*, *Wood v. Goodrich*, 9 Yerg. 266 (1836), where it was held that relief could only be had in equity.

³ *Kelsey v. Hibbs*, 13 Ohio St. 340 (1862).

⁴ *Lamon v. French*, 25 Wis. 37 (1869).

⁵ This is the case where a note contains a power to the payees to demand payment "at any time they may deem this note insecure, even before the maturity of the same," *First Nat. Bank v. Bynum*, 84 N. C. 24 (1881).

⁶ *Henschel v. Mahler*, 3 Den. 428 (1846), *Johnson*, J., dissenting.

⁷ *Wade v. Darrow*, 15 Ind. 212 (1860); but action for performance by giving such notes need not be deferred until the expiration of that time, *Id.*

⁸ *Washington Co. Bank v. Jerome*, 8 Mich. 490 (1860).

maturing in such given time from the day it is issued.¹ But if it is post-dated, the written date is intended and not the time of delivery.²

§ 111. **Payment Conditional**—"When Able"—"When in Funds."—If the time mentioned for payment is plainly uncertain and conditional, the bill or note thereby becomes non-negotiable. This is so in the case of a note payable "when my circumstances will admit without detriment to myself or family;"³ or "as soon as my circumstances will permit."⁴ But a note payable "when convenient" has been held to be payable in a "reasonable time" and therefore negotiable.⁵ So, a note payable "as soon as I possibly can," has been held to be payable "presently" or on demand.⁶ And a note "renewed for an indefinite time * * * the whole amount then to pay when both parties may agree," has been held to fall due in a reasonable time.⁷ And even a note providing "I am to have the privilege of extending the time of payment as long as I choose by paying the interest annually," has been held valid as a note.⁸ But a due

¹Richardson v. Ellett, 10 Tex. 190 (1853). Therefore, if it is payable "one day after date," it does not mature until the next day and cannot be sued until the day after, *Raele v. Moore*, 58 Ga. 94 (1877).

²1 Edwards § 171; 1 Parsons 49; *Powell v. Waters*, 8 Cow. 669 (1826); *Bumpass v. Timms*, 3 Sneed 459 (1856). And such time of delivery may be shown by parol, *Byles* 79; *Story on Bills* 37; *Davis v. Jones*, 17 C. B. 625; *Giles v. Bourne*, 6 M. & S. 73; *Richardson v. Ellett*, 10 Tex. 190 (1853); *Kenner v. Creditors*, 10 Mart. 17 (La. 1829). But not to defeat a *bona fide* holder by proof of delivery on Sunday, *Greathead v. Walton*, 40 Conn. 226 (1873).

³*Chitty* 156; *Ex parte Tootell*, 4 Ves. 372 (1798).

⁴*Salinas v. Wright*, 11 Tex. 572 (1854).

⁵*Works v. Hershey*, 35 Iowa 340 (1872), and see *Jones v. Eisler*, 3 Kans. 134 (1865). Not so, however, a note payable "on or before four years" with interest not to be paid annually "unless convenient" and an agreement to take other securities in exchange. *Humphrey v. Beckwith*, 48 Mich. 151 (1882). Nor a note providing for indefinite extension by the payee, *Smith v. Van Blarcom*, 45 Mich. 371 (1881); *Woodbury v. Roberts*, 59 Iowa 348 (1882). But the words "this note to be extended if desired by makers" have been held too indefinite to affect the note and could not be rendered more definite by an unauthorized memorandum by the holder, *Krouskop v. Shontz*, 51 Wis. 204 (1881).

⁶*Kincaid v. Higgins*, 1 Bibb 396 (1809); and parol evidence of an agreement to wait until a certain draft should be received from New Orleans was rejected as tending to vary the meaning of the note.

⁷*Ramot v. Schotenfels*, 15 Iowa 457 (1865).

⁸*Maupin v. McCormick*, 2 Bush 206 (1867).

bill, "to be paid as wanted for her support, and if no part is wanted it is not to be paid," is clearly contingent and not negotiable as a note.¹ It is said, however, that a note payable "when able" means "on demand if then able;"² and that a promise to pay a note "when able" is not sufficient to take it out of the Statute of Limitations.³

If a bill or note is made payable "when in funds," it is conditional and not negotiable.⁴ So, if payable "as soon as I am in possession of funds from the estate of B."⁵ A note payable "when in funds" need not be protested until such time arrives.⁶ And in all such cases the burden of showing the maker or acceptor to be in funds is upon the holder of the note or bill.⁷

§ 112. **Payable "When Realized from Sales"—"When Collected."**—If an order is made payable "ninety days after sight or when realized," this means, in the language of Lord Campbell, C. J., "when you are in funds for the purpose;" and such instrument was held not to be a bill of exchange.⁸ In like manner, an instrument payable "when the amount shall be collected" is a conditional agreement and not a note.⁹ But it has been held, with apparent contradiction, that an instrument payable in one year "and if not enough realized in one year, to have more time," is payable in a reasonable time and negotiable.¹⁰ So, too, an instrument payable "as soon as collected from my accounts at P."¹¹

¹Gordon v. Rundlett, 28 N. H. 435 (1854).

²Veasey v. Reeves, 6 Ind. 406 (1855).

³Wilcox v. Williams, 5 Nev. 206 (1869).

⁴Gillespie v. Mather, 10 Penna. St. 28 (1848). See, too, Jackson v. Tilghman, 1 Miles 31 (Penna. 1835).

⁵Wiggins v. Vaught, Cheves 91 (1840).

⁶Harrell v. Marston, 7 Rob. 34 (La. 1844).

⁷Mason v. Graff, 35 Penna. St. 448 (1860).

⁸Alexander v. Thomas, 16 Q. B. 333 (1851). But see *infra*.

⁹Corbett v. State of Georgia, 24 Ga. 287 (1858); Henry v. Hazen, 5 Ark. 401 (1842). So far at least as to put the sum out of reach of an attachment against the payee. State v. Burton, 11 Wis. 50. And such note cannot mature until the amount has been collected, Allen v. Davis, 11 Mo. 479 (1848).

¹⁰Capron v. Capron, 44 Vt. 410 (1872).

¹¹Ursdell v. Cunningham, 22 Mo. 124 (1855); Vaughan v. Dean, 32 Ga. 502 (1861); Woolbright v. Sneed, 5 Ib. 167 (1848).

It is said that a note payable eight months after date, "to be paid as soon as I can get my returns from New Orleans or at the above date at the furthest," is sufficiently declared on as payable eight months after date.¹ And there seems to be a reasonable distinction between such instruments as that last mentioned and instruments payable only when realized or collected. If payable "as soon as can be realized from the property I have this day purchased * * * to be paid in the course of the season now coming," it is payable certainly at the end of the season (although it may become due sooner in a certain contingency), and is therefore held to be negotiable.² So, too, if payable six months after date "or sooner if made out of a sale" of certain property;³ "or as soon as I can with due diligence make the money out of said patent right;"⁴ or as soon "as A.'s horse earns the money in the cavalry service."⁵

On the other hand, a promise of payment on the sale of certain property, without other time fixed, is not a promissory note.⁶ Neither is a promise of payment "as soon as the crop can be sold or the money raised from any other source," although held to be due in a reasonable time;⁷ or of payment at a time certain with a stipulation "not to ask or expect payment until the old mill is sold."⁸

¹ *Hoover v. Johnson*, 6 Blackf. 473 (1843).

² *Cota v. Buck*, 7 Metc. 588 (1844), Shaw, C. J., saying: "The true test of the negotiability of a note seems to be whether the undertaking of the promisor is to pay the amount at all events at some time which must certainly come."

³ *Ernst v. Stockman*, 74 Penna. St. 13 (1873); *Cisne v. Chidester*, 85 Ill. 523 (1877); *McCarty v. Howell*, 24 Ill. 341 (1860); *Walker v. Woollen*, 54 Ind. 164 (1876).

⁴ *Palmer v. Hummer*, 10 Kans. 464 (1872).

⁵ *Gardner v. Barger*, 4 Heisk. 669 (1871).

⁶ *Hill v. Halford*, 2 B. & P. 413 (1801); *De Forest v. Frary*, 6 Cow. 151 (1826). But in *Illinois* an agreement to pay "whenever the lands in the late purchase in Iowa Territory shall be advertised for sale" has been held to be a promissory note, *Glancy v. Elliott*, 14 Ill. 456. So, in *Maine*, "from the avails of logs bought of A. B. when there is a sale made," *Sears v. Wright*, 24 Me. 278 (1844); or "when I sell my place where I now live," *i. e.* in a reasonable time, *Crooker v. Holmes*, 65 Me. 195 (1875).

⁷ *Nunez v. Dautel*, 19 Wall. 560 (1873).

⁸ *Blake v. Coleman*, 22 Wis. 396 (1868).

§ 113. **Payable on Death—Marriage—Coming of Age.**—Commercial paper may be made payable on any event, however remote, which must inevitably happen some time or other. Thus, it may be payable *on the death* of a certain person;¹ or “on demand after my decease;”² or “one day after date or at my death.”³ It will, however, be unavailing as a note, if delivery is postponed until then;⁴ or if the amount is rendered uncertain by the uncertain date of the death, as if payable in installments to cease on the death of A. B.⁵

On the other hand, *marriage* is an uncertain event, which may never happen. A note or bill cannot, therefore, be made payable “ninety days after my marriage;”⁶ or “if I am married in two months;”⁷ or “when A. B. shall marry.”⁸

So, too, the time of a certain person *coming of age* is certain, but his living until then is uncertain. A note, therefore, payable “when A. shall come of age” is not negotiable.⁹ But a note payable to A. B. “when he shall come of age, to wit, 12th June, 1750,” is payable at all events on the day named, and therefore negotiable.¹⁰

§ 114. **Payable in Installments—On Default of Interest—After Notice.**—A bill or note may be made payable in installments, unless prohibited by statute.¹¹ And where a note is given for \$1,200, “\$200 in each year,” the installments will be due at the end of each year reckoned from the date of the

¹ *Cooke v. Colehan*, 2 Stra. 1217; *Roffey v. Greenwell*, 2 Perry & D. 365; 11 Ad. & E. 222.

² *Bristol v. Warner*, 19 Conn. 7 (1848).

³ *Conn v. Thornton*, 46 Ala. 587 (1871).

⁴ *Warren v. Durfee*, 126 Mass. 338 (1879). In this case the note was found in a sealed envelope, and was without consideration and not executed as a will, and it was held to be wholly without force.

⁵ *Chitty* 156; *Worley v. Harrison*, 3 Ad. & E. 669.

⁶ *Beardsley v. Baldwin*, 2 Stra. 1151; and see, *Pearson v. Garrett*, 4 Mod. 242.

⁷ *Chitty* 156; *Pearson v. Garrett*, 4 Mod. 242 (1694).

⁸ *Chitty* 156; *Pearson v. Garrett*, 4 Mod. 242 (1694).

⁹ *Kelley v. Hemmingway*, 13 Ill. 604 (1852).

¹⁰ *Chitty* 158; 2 Bl. Com. 513; *Goss v. Nelson*, 1 Burr. 226.

¹¹ *Wright v. Irwin*, 33 Mich. 32.

note.¹ So, a time may be named for the entire payment to be made, with installments in the meantime at intervals.²

Or a note may be made payable in installments and the whole be made payable on default in any installment;"³ or, at the holder's option, on default in the payment of interest.⁴ But where a trust deed securing several notes contains a provision making all due in default of any one, and this provision is not in the notes, it will only take effect so far as it regards the proceeds of sale under the trust deed.⁵ So, a note may be made payable "in such portions and at such times as the directors (payees) may require," and it is then equivalent to a note payable on demand.⁶ This is a common form of notes given for insurance premiums.

A note may also be payable in a certain time after notice.⁷ In such case it is payable forthwith on notice and expiration of time fixed, although there may be a provision "not to draw interest unless it remains three months."⁸

§ 115. **Payable on Return of Papers—Completion of Building—Settlement of Accounts—Arrival of Ship.**—Again, a certificate payable "on return of this certificate," is negotiable;⁹ but not, if payable on the return of another paper, *e. g.*

¹ *Rideout v. Woods*, 30 N. H. 375 (1854).

² *Ewer v. Meyrick*, 1 Cush. 16 (1848). This was a note for \$750 payable in ten years, "\$50 of the principal to be paid annually until the whole is paid." The whole note became due in ten years.

³ *Carlton v. Kenealy*, 12 M. & W. 139 (1843); *Cooke v. Horn*, 29 L. T. (N. S.) 369. See, too, *German Mut. Ins. Co. v. Franck*, 22 Ind. 364 (1864); *May, & c., v. City Bank*, 58 Ga. 584 (1877). But in the absence of express provision for the whole to become due on default in installments, parol evidence is inadmissible to show an agreement to that effect, *Blakemore v. Wood*, 3 Sneed 470 (1856).

⁴ *Sea v. Glover*, 1 Bradw. 335 (1878).

⁵ *Morgan v. Martien*, 32 Mo. 438 (1862).

⁶ *Colgate v. Buckingham*, 39 Barb. 177 (1863); *Savage v. Medbury*, 19 N. Y. 32; *Howland v. Edmonds*, 24 Ib. 307 (1862); *Protection Ins. Co. v. Bill*, 31 Conn. 534 (1863); *White v. Smith*, 77 Ill. 351 (1875); *Goshen Turnpike v. Hurtin*, 9 Johns. 217 (1812); *Dutchess Cotton Mfy. v. Davis*, 14 Johns. 244 (1817); *Gaytes v. Hibbard*, 5 Biss. C. C. 100 (1869). But see, *contra*, *Washington Mut. Ins. v. Miller*, 26 Vt. 77. See, also, *Stillwell v. Craig*, 58 Mo. 24 (1874).

⁷ *Clayton v. Gosling*, 5 B. & C. 360; S. C., 3 Dow. & R. 110.

⁸ *Richer v. Voyer*, L. R. 5 P. C. 461 (1874).

⁹ *Smilie v. Stevens*, 39 Vt. 315 (1866); *Hunt v. Divine*, 37 Ill. 137 (1865). So, a receipt for "\$2,400 paper currency from A. B. which I promise to pay

a guaranty of another note.¹ And a negotiable note, payable in four years, "or upon surrender of note at any time before maturity to issue stock for it," is not made non-negotiable by the last provision.²

A negotiable note may be made payable when the payee shall have constructed a certain railroad;³ or completed a certain building according to contract.⁴ But a note given for the construction of a canal, payable "on the final estimate of said section," is uncertain and non-negotiable.⁵

If the time fixed for payment is the settlement of an estate, account or litigation, it is necessarily uncertain and may never arrive. In all such cases the instrument is conditional and not negotiable, *e. g.* if payable "when the estate of A. is settled;"⁶ or "ninety days after dissolution of the partnership and settlement of its books;"⁷ or when a dividend is declared;⁸ or when a suit is determined between A. and B.;⁹ or "as soon as you receive the amount of my account of the government from A. B."¹⁰ But a note made payable January 1st, 1865, "on condition that the banks of Tennessee have resumed specie payment at that time, if not, as soon

to said A. B. or order on return of this receipt," is a negotiable note in New York, *Frank v. Wessels*, 64 N. Y. 158 (1876).

¹*Smilie v. Stevens*, 39 Vt. 315 (1866).

²*Hodges v. Shaler*, 22 N. Y. 114 (1860).

³*Rose v. S. A. & M. G. R. R.*, 31 Tex. 49 (1868). But the renewal of such a note, made payable in four years and not referring to the construction of the road, will fall due in four years without reference to the completion of the railroad, *Four Mile V. R. R. v. Bailey*, 18 Ohio St. 208 (1868).

⁴*Stevens v. Blunt*, 7 Mass. 240 (1810); *Bristol v. Warner*, 19 Conn. 7 (1848); *Goodloe v. Taylor*, 3 Hawks 458 (1825); *Levally v. Harmon*, 20 Iowa 533 (1866). So, "as soon as can be collected out of the contract, and if not so collected, in four years," *Smith v. Ellis*, 29 Mo. 422 (1849).

⁵*Weidler v. Kauffman*, 14 Ohio 455 (1846). So, an order payable "in installments, \$200 out of the first estimate or when the first floor joists are in, \$200 when the building is ready for the roof," &c., *Miller v. Excelsior Stone Co.*, 1 Ill. App. 273 (1878).

⁶*Husband v. Epling*, 81 Ill. 172 (1876).

⁷*Sackett v. Palmer*, 25 Barb. 179 (1857). But in *Scull v. Roane, Hempst. C. C.* 103 (1831), it was held that a note payable on settlement of accounts was due in a reasonable time and might be sued after one year.

⁸*Brooks v. Hargreaves*, 21 Mich. 254 (1870).

⁹*Shelton v. Bruce*, 9 Yerg. 24 (1836).

¹⁰*Henry v. Hazen*, 5 Ark. 401 (1842).

as they do resume," was held to be due January 1st, 1865, on waiver of claim to payment in coin¹.

The arrival of a ship is also an uncertain event, and an order payable at such time is not a bill of exchange;² for, being payable only on the ship's safe arrival, it is never due if the ship be lost.³ But it is said that the paying off of a king's ship is a thing of a public nature, to be regarded in law as certain to happen, and that a bill payable on such event is unconditional.⁴

§ 116. **Payable on Public Event—Wager.**—It sometimes occurs that the time of payment mentioned in the bill or note refers to some public event in a manner that gives it the appearance of a wager rather than a *bona fide* contract. This was plainly the case in a note made payable "on the election of R. B. Hayes to the office of President of the United States," with a provision that if he was not elected the note should be void.⁵ In like manner a note, payable when the legislature shall have recognized certain bonds, is contingent and non-negotiable.⁶ But it has been held, in California, that a note payable out of a certain appropriation, "when made," was payable, irrespective of the appropriation, when the contractor was paid, and might be collected on proof of the happening of that event.⁷ In North Carolina a note payable at a given time "after peace between the United States of America and the Confederate States" was

¹Walters v. McBee, 1 B. J. Lea 364 (1878).

²Palmer v. Pratt, 2 Bing. 185 (1824). So, too, if payable after arrival and discharge of coal by the brig G., Grant v. Wood, 12 Gray 220 (1858).

³Tucker v. Maxwell, 11 Mass. 143 (1814).

⁴Andrews v. Franklin, 1 Stra. 24; Evans v. Underwood, 1 Wils. 262 (1749); but this decision is called "questionable," Chitty 159. See, too, Hausoullier v. Hartsink, 7 T. R. 733; Dixon v. Nuttall, 6 Carr. & P. 320.

⁵Lockhart v. Hullinger, 2 Bradw. 465 (1877). And see, in other similar cases, Gordon v. Casey, 23 Ill. 70 (1859); Guyman v. Burlingame, 36 Ib. 201; Gregory v. King, 58 Ib. 169; Danforth v. Evans, 16 Vt. 538 (1844). But in Williams v. Smith, 4 Ill. 524 (1842), it was held that an action would lie on a note payable "when William H. Harrison shall be elected President of the United States," on proper averment and proof that the contingency had happened.

⁶Leak v. Bear, 80 N. C. 271 (1879).

⁷Nagle v. Homer, 8 Cal. 353.

held to be void as a wager contract.¹ But such notes have been sustained in other States as payable unconditionally.² Where, however, the note was made payable "after the ratification of peace," &c., the want of an averment that the event had happened was held to be fatal to the declaration on such note.³

§ 117. **Payable "On Demand."**—Bills and notes are frequently made payable on demand. Except as otherwise provided by statute, such notes and bills are due immediately⁴ and without grace.⁵ And such a note, in Connecticut, is between the original parties due immediately, notwithstanding a statute of Connecticut fixing the term of four months for the maturity of demand notes.⁶ In Georgia demand notes are by statute made due immediately.⁷ In Missouri bills of exchange, drafts and orders, payable at sight or on demand, become due when presented for payment;⁸ and in North Carolina "when demandable."⁹ This is also held to

¹*McNinch v. Ramsay*, 66 N. C. 229 (1872). But see *Chapman v. Wacaser*, 64 N. C. 532 (1870).

²*Gaines v. Dorsett*, 18 La. An. 563 (1866); *Mortee v. Edwards*, 20 La. An. 236 (1818); *Brewster v. Williams*, 2 So. Car. 455 (1871); *Knight v. Reynolds*, 37 Tex. 204 (1872); *Atcheson v. Scott*, 51 *Ib.* 213 (1879), overruling *Thompson v. Houston*, 31 *Ib.* 610 (1869). See, too, *Shaw v. Trunsler*, 30 Tex. 390 (1867); *Nelson v. Manning*, 53 Ala. 549 (1875). But in *Brewster v. Williams*, *supra*, it was held that peace, as contemplated, was never made and the time for payment never arrived.

³*Harris v. Lewis*, 5 W. Va. 575 (1872).

⁴*Wheeler v. Warner*, 47 N. Y. 519 (1872); *Howland v. Edmonds*, 24 *Ib.* 307 (1862); *Herrick v. Woolverton*, 41 *Ib.* 591 (1870); *Palmer v. Palmer*, 36 Mich. 487 (1877); *Norton v. Ellam*, 2 M. & W. 461 (1837); *Cammer v. Harrison*, 2 McCord 246 (1822); *Easton v. McAllister*, 1 Mo. 662 (1826); *Caldwell v. Rodman*, 5 Jones 139 (1857). And such a note will be regarded as overdue after the lapse of a reasonable time, *Herrick v. Woolverton*, 41 N. Y. 581 (1870).

⁵*Cammer v. Harrison*, 2 McCord 246 (1822); *Davenport Bank v. Price*, 52 Iowa 570 (1879). And this is provided by statute in Minnesota (1878 G. S. c. 23 § 18) and Vermont (1872 P. L. p. 91).

⁶*Seymour v. Continental Life Ins.*, 44 Conn. 300 (1877); Gen. Stats. 343 § 2 (1875). Massachusetts has the same statute (1859 G. S. c. 53 § 9; Amendment of 1865 tit. 45 § 2). Similar statutes, fixing sixty days and having for their object the protection of indorsers against stale claims, are found in Minnesota (1878 G. S. c. 23 § 11); New Hampshire (1878 G. L. c. 220 § 11).

⁷1873 Code § 2791.

⁸1879 1 Rev. Stats. Mo. c. 10 § 550; G. S. p. 397 § 18.

⁹1873 Bat. Rev. c. 10 § 5.

be the law in Ohio.¹ It is said that when a note is payable on demand, the maker may pay it at any time without waiting for a demand.² But a note, given for Confederate notes borrowed and made payable on demand, cannot be shown by parol to have intended a payment *in* Confederate notes at any time, and a tender without demand of such notes, in March, 1863, in payment of a promissory note dated July, 1862, is no defense to an action on the demand note.³

§ 118. **Payable on Demand—Equivalent Expressions.**—Demand notes and bills are not necessarily payable in words "on demand." The purpose of making them so payable may be expressed in other equivalent words. The following have been held to be equivalent expressions: "When demanded;"⁴ "when called for;"⁵ "on request" or "on being called;"⁶ "at any time called for;"⁷ "at such times as A. may need for her support."⁸

Sometimes the intention is less clear by reason of another time being mentioned, from which it is to draw interest. Thus, a note payable "on demand the first of January next," has been held to be payable immediately, but to draw interest only from January 1st.⁹ So, too, if payable "on demand with interest after six months;"¹⁰ or "on demand * * * not to draw interest during my life;"¹¹ or "on de-

¹Gordon v. Preston, Wright 341 (Ohio 1833); McLure v. Longworth, *Ib.* 582. And in these cases it was held that interest only ran from the time of such demand.

²Stover v. Hamilton, 21 Gratt. 273 (1871).

³Terrell v. Walker, 66 N. C. 244 (1872).

⁴Kingsbury v. Butler, 4 Vt. 458 (1832). So, a certificate of deposit subject to the depositor's order, with interest payable on call at seven per cent., or by the year at ten per cent., is negotiable and due immediately, Lynch v. Goldsmith, 64 Ga. 42 (1879). But a note expressing no time of payment, "with ten per cent. after maturity," was held not to be payable on demand, First Nat. Bank v. Price, 52 Iowa 575 (1879).

⁵Bilderback v. Burlingame, 27 Ill. 338 (1862).

⁶Howland v. Edmonds, 24 N. Y. 307 (1862).

⁷Bowman v. McChesney, 22 Gratt. 609 (1872).

⁸Corbett v. Stonemetz, 15 Wis. 187 (1862).

⁹Brett v. Ming, 1 Fla. 447 (1847).

¹⁰Rice v. West, 11 Me. 323 (1834). But "on demand with interest *within* six months from date," means within six months at all events and sooner if demanded, Jillson v. Hill, 4 Gray 316 (1855).

¹¹Newman v. Kettelle, 13 Pick. 418 (1832).

mand with interest annually four months from date.”¹ But if the instrument was originally payable “on demand with interest after six months,” and the words “on demand” have been erased, principal as well as interest is only payable after six months.²

On the other hand, the words indicating immediate payment may be controlled by other words or conditions rendering them nugatory. Thus, a note payable “six months after date * * * in current funds when called for,” is only payable after six months.³ So, a note payable “on demand” with interest, “but no demand is to be made as long as the interest is paid,” is only payable in the alternative.⁴

§ 119. **Payable on Demand if no Time Expressed.**—If no time of payment is expressed (which is usually the case in checks and frequently so in promissory notes and drafts), the instrument is by intendment of law payable on demand, and is as valid and negotiable as though the time of payment were fully expressed.⁵ And a lost note will be presumed to have been payable on demand.⁶ But if a note is post-dated and no time of payment is expressed, it will be due on and after the day of its date.⁷ If, however, it is made payable in

¹Shaw v. Shaw, 43 N. H. 170 (1861).

²Hobart v. Dodge, 10 Me. 156 (1833).

³Davis v. Glenn, 72 N. C. 519 (1875).

⁴Seacord v. Burling, 5 Dev. 444 (1848).

⁵Byles 81; Chitty 173; Boehm v. Sterling, 7 T. R. 427; Whitlock v. Underwood, 3 D. & R. 356 (1823); S. C., 2 B. & C. 157; Down v. Halling, 4 B. & C. 333; S. C., 6 D. & R. 455; S. C., 2 C. & P. 11; Thompson v. Ketcham, 8 Johns. 192 (1811); Bacon v. Page, 1 Conn. 404 (1815); Lobdell v. Hopkins, 5 Cow. 516 (1826); Mason v. Palton, 1 Mo. 279 (1823); Gaylord v. Van Loan, 15 Wend. 308 (1836); Kendall v. Galvin, 15 Me. 131 (1838); Burthe v. Donaldson, 15 La. 382 (1840); Cornell v. Moulton, 3 Den. 12 (1846); Green v. Drebillis, 1 Iowa 552 (1848); Freeman v. Ross, 15 Ga. 252 (1854); Sackett v. Spencer, 29 Barb. 180 (1859); Pindar v. Barlow, 31 Vt. 529 (1859); Jones v. Brown, 11 Ohio St. 601 (1860); Holmes v. West, 17 Cal. 623 (1861); Porter v. Porter, 51 Me. 376 (1862); Keyes v. Fenstermaker, 24 Cal. 329 (1864); Huyck v. Meador, 24 Ark. 191 (1866); Meador v. Dollar Sav. Bank, 56 Ga. 604 (1876); Dodd v. Denny, 6 Oregon 156 (1876); Salinas v. Wright, 11 Tex. 572; Davenport Bank v. Price, 52 Iowa 570 (1879); Libby v. Nikelborg, 28 Minn. 38 (1881). And the addition of the words “on demand” does not constitute a material alteration in such case, Aldous v. Cornwell, L. R. 3 Q. B. 573 (1868).

⁶Tucker v. Tucker, 119 Mass. 79 (1875).

⁷Mohawk Bank v. Broderick, 10 Wend. 304, affirmed 13 *Id.* 133 (1835); Gough v. Stuts, 13 Wend. 549 (1835).

installments and no time of payment is named, it is not a valid negotiable instrument.¹ It is said that a due-bill for the delivery of sheep expressing no time for such delivery falls due in a "reasonable time," and that a different time for payment cannot be proved by parol.²

The rule, that where no time of payment is expressed the bill or note is payable on demand, applies to instruments naming a time for payment of interest but none for payment of principal. In this case the principal is payable on demand.³ But the converse of this is not true. Thus, if a note be for five years "with interest from date," the interest was held to be payable only on the maturity of the principal.⁴ If, however, it be "with interest annually," the interest will become due at the end of each year.⁵ Where a bill is overdue and therefore payable immediately, an agreement to pay "ten per cent. on this bill until paid" does not extend the time of payment by implication.⁶ But conversely an agreement for allowance of interest on payments of principal, which may be made before they are due, is equivalent to an agreement giving the maker the privilege of paying the principal before maturity.⁷

§ 120. **Memorandum as to Time of Payment—Parol Evidence.**—A bill or note may in terms be payable on demand, with a memorandum at the foot of the instrument that the maker shall not be compelled to pay it before a certain day named. This memorandum is part of the contract and controls

¹ *Moffat v. Edwards*, Car. & Marsh. 16 (1841).

² *Self v. King*, 28 Tex. 552 (1866).

³ *Loring v. Gurney*, 5 Pick. 15 (1827); *Meador v. Dollar Sav. Bank*, 56 Ga. 604 (1876); *Holmes v. West*, 17 Cal. 623 (1861).

⁴ *Koehring v. Muemminghoff*, 61 Mo. 403 (1875). But in a similar case, where a mortgage securing the note provided for the payment of the interest annually, the interest was held to become due according to the terms of the mortgage, *Meyer v. Graeber*, 19 Kans. 165.

⁵ *Walker v. Kimball*, 22 Ill. 537; *Failing v. Clemmer*, 49 Iowa 104 (1878).

⁶ *Alston v. Wingfield*, 53 Ga. 18, and parol evidence of an agreement to pay in ten years is not admissible.

⁷ *Crocker v. Green*, 54 Ga. 494 (1875).

the time of payment.¹ So, too, an indorsement that the whole shall be due on default in paying any interest coupon.² And the same thing, it has been held, may be accomplished by a contemporaneous agreement, though not written on the paper.³ But a verbal agreement between indorser and indorsee at the time of the indorsement, made without any consideration, for a postponement of the time of payment, is without force and furnishes no excuse to the holder for non-presentment at maturity.⁴

Like other material parts of a bill or note, the time of payment cannot be varied by parol.⁵ And even if it recites as a consideration services to be rendered, it cannot be shown by parol that, although made payable in six months, it was not to be paid until the services were rendered.⁶ And even although the time is not expressed and the instrument is payable on demand only by implication of law, it cannot be shown by parol to be payable at some other time.⁷

¹Franklin Sav. Inst. v. Reed, 125 Mass. 365 (1878). So a note payable one day after date with a memorandum indorsed, "to be paid when A. collects a certain note of B.," *McCalla v. McCalla*, 48 Ga. 503 (1873); or "one-half to be paid in twelve months, the balance in twenty-four months," *Heywood v. Perrin*, 10 Pick. 228 (1830); *Wheelock v. Freeman*, 13 *Ib.* 165 (1832); or "this note to be extended if desired by makers," *Krouskop v. Shontz*, 51 Wis. 204 (1881). And a provision in a collateral mortgage, securing several notes and postponing the maturity of all until the last should become payable, will control the notes, *Brownlee v. Arnold*, 60 Mo. 79 (1875).

²*Mayor, &c., v. City Bank*, 48 Ga. 584 (1877).

³*Round v. Donnel*, 5 Kans. 54 (1869).

⁴*Michaud v. Lagarde*, 4 Minn. 43 (1860).

⁵*Woodbridge v. Spooner*, 3 B. & Ald. 233 (1819); *Eaton v. Emerson*, 14 Me. 335 (1837); *Graves v. Clark*, 6 Blackf. 183 (1842). Nor can parol evidence be admitted to show a contemporaneous agreement for renewal or forbearance, *Diercks v. Roberts*, 13 So. Car. 338 (1879). Although in the case of a note payable one day after date and indorsed in blank, it was held that the indorsement was only *prima facie* a guaranty of payment and that a parol agreement by the indorser giving a reasonable time to collect might be shown, *Clark v. Merriam*, 25 Conn. 578 (1857).

⁶*Walker v. Clay*, 21 Ala. 797 (1852).

⁷*Thompson v. Ketcham*, 8 Johns. 192 (1811); *Koehring v. Muemminghoff*, 61 Mo. 403; *Self v. King*, 28 Tex. 552 (1866).

C. Certainty as to Place of Payment.

121. Place of Payment should be Designated—Foreign Statutes.
 122. not Expressed in Bill or Acceptance.
 123. Memorandum—Blank.
 124. Mistakes—Parol Evidence—Presumptions.
 125. Several Places Named—Pleading.
 126. Presentment how far Governed by Designation of Place.
 128. American Statutes as to Place of Payment.

§ 121. **Place of Payment should be Designated—Foreign Statutes.**—It is usual both in bills and notes to designate a place of payment. In bills of exchange this is ordinarily expressed in the drawee's address either at the top or bottom of the bill. In promissory notes it is generally expressed in the concluding words before the signature by the phrase "payable at," &c., or simply "at," &c. By the common law it is not necessary to the completeness or negotiability of any commercial or negotiable instrument.¹ And as between the immediate parties to the paper it is said to be "merely modal, forming no essential part of the contract."²

Bills and notes drawn in foreign countries are generally required by statute to designate a place of payment.³ And in

¹Chitty 174; 1 Daniel 99; Story on Bills § 48; Story on Prom. Notes § 49; 1 Edwards § 183; Mitchell v. Baring, 10 B. & C. 4; Taylor v. Snyder, 3 Den. 150 (1846); Bank of America v. Woodworth, 18 Johns. 315; S. C., 19 *Ib.* 391; Blodgett v. Durgin, 32 Vt. 361 (1859); Bank of Newbury v. Richards, 35 Vt. 281 (1862); Craig v. Price, 23 Ark. 633 (1861); Holtz v. Boppe, 37 N. Y. 634 (1868); Kendall v. Galvin, 15 Me. 131 (1838).

²See opinions of Spencer, C. J., in Wolcott v. Van Santvoord, 17 Johns. 254 (1819); and Senator Skinner in Woodworth v. Bank of America, 19 *Ib.* 420 (1821).

³Story on Prom. Notes § 49. And see Code Napoleon, in appendix. If no place of payment be expressed in a bill or note, it is payable at the place where it is made in the *Argentine Republic* (1862 Code Com. Arts. 783, 917). In *Denmark* (1825 Exch. Law § 7) every bill must indicate its place of payment, if other than at the drawee's residence, and this will be presumed to be the place of payment if none is expressed. In *Germany* (1848 Exch. Law Art. 4) a bill of exchange must indicate its place of payment, but the drawee's address will suffice for this, and in a note, the place of making will be taken for the maker's residence and the place of payment, if no other is expressed (Art. 97). So, in *Austria* (1850 Exch. Law). In *Holland* (1833 Exch. Law Art. 208) a note may be made payable at the maker's residence or elsewhere. In *Hungary* (1860 Exch. Law ch. 1 §§ 1, 14) bills must express a place of payment, and if several places are named, the first place named shall govern (§ 18). In *Bolivia* (1834 Code Com. Art. 463) drafts must express a place of payment, although this is not required for bills of exchange. This is also the law as regards notes, if they are payable

conformity with the original idea and purpose of a bill of exchange it is still necessary in some countries that it be made payable at a place different from that where it is drawn.¹

In Great Britain promissory notes for less than £20, payable to bearer on demand, must be made payable where they are issued, but may be also payable elsewhere.² It is also provided by statute, in Great Britain, that Bank of England notes shall be payable only at the bank in London, unless specially made payable at a branch bank, and that the notes of its branch banks shall be made payable where

at any other place than the maker's residence (Art. 469). In *Brazil* bills and notes must indicate the place of payment (1850 Code Com. Arts. 354, 426). In *Chili* bills of exchange must indicate the place of payment, if other than the residence of the drawee (1865 Code Com. Art. 633); likewise drafts and notes, if payable otherwise than at the place where made (Art. 771). In *Italy* bills and notes must indicate the place of payment (1865 Code Com. Arts. 196, 273). So, in *Mexico*, all bills, notes and drafts (1854 Code Com. Arts. 223, 447). So, in *Nicaragua*, bills of exchange and notes (1869 Code Com. Arts. 241, 316). So, in *Honduras, Guatemala and Paraguay* (Ord. Bilbao A. D. 1774 ch. 13 § 2; ch. 14 § 1). In *Spain* (1829 Code Com. Art. 563) drafts and notes must indicate the place of payment, although the statute makes no such requirement for bills of exchange. So, too, in *Colombia* (1853 Code Com. Art. 517); *Salvador* (1855 Code Com. Art. 510); *Uruguay* (1865 Code Com. Art. 789). In *Lower Canada* (1867 Civil Code § 2283) if a bill does not indicate its place of payment it is payable generally. In *Switzerland* (Berne 1859 § 3) a bill of exchange must indicate its place of payment, which may be done in Zurich (1805 § 1) and Basle (1863 § 3) by the drawee's address, but in Berne (1859 § 3) both address and place of payment are necessary. If no place is mentioned in a promissory note the place of making is the place of payment (Basle 1863 § 88; Berne 1859 § 12). In *Portugal* (1833 Code Com. Arts. 427, 428) a promissory note may be made payable at the maker's residence or elsewhere, but in the latter case it receives the qualities of a bill of exchange only by its transfer from one place to another. In *Sweden and Norway* (1851 Exch. Law ch. 1 §§ 1, 2) bills may be made payable at the drawee's residence or elsewhere, and must express the place of payment, but the drawee's address will suffice for this. In *Venezuela* (1862 Code Com. Art. 1) bills of exchange must express a place of payment.

¹A bill of exchange must be payable in a different place from that where it is drawn in *Belgium* (Code Napoleon § 110); *Bolivia* (1834 Code Com. Art. 349); *Chili* (1865 Code Com. Art. 637); *Colombia* (1853 Code Com. Art. 387); *Costa Rica* 1853 Code Com. Art. 376); *Ecuador* (Spanish Code); *France* (Code Napoleon § 110); *Geneva* (Code Napoleon); *Greece* (Code Napoleon); *Hayti* (Code Napoleon); *Holland* (1838 Exch. Law Art. 100); *Italy* (1865 Code Com. Art. 196); *Mexico* (1854 Code Com. Art. 323); *Portugal* (1833 Code Com. Art. 321); *Salvador* (1855 Code Com. Art. 384); *Spain* (1829 Code Com. Art. 429). In *Peru* (1853 Code Com. Art. 385) it is merely an evidence of debt, if not made payable at a different place from its date. In *Switzerland* (Basle 1863 § 5; Berne 1859 § 5) a bill may be payable where it is drawn, but the drawer can only draw on himself at another place (§ 6). In *Germany* the drawer of a bill of exchange can only be the drawee, if it is made payable at a different place from that of its date (1848 Exch. Law Art. 6).

²7 Geo. IV. c. 6 § 10.

they are issued.¹ All bills or notes drawn by co-partnerships or corporations of more than six persons were required formerly to specify the place of payment, and that place not to be in London or within sixty-five miles of London, excepting, however, bills of £50 and upwards payable at some period after date or sight, drawn by such copartnerships or corporations carrying on business more than sixty-five miles from London.² The restriction as to the amount was afterwards done away by a statute which empowered other corporations and copartnerships of more than six persons to carry on business in London, provided they should not issue bills or notes at not less than six months.³ But this restriction also has now been removed.⁴

§ 122. **Place not Expressed in Bill or Acceptance.**—Where no place of payment is named in a bill or note, it is understood to be payable at the residence of the drawee of the bill or the maker of the note.⁵ And in such case a lawful tender can only be made to the holder personally or at such residence.⁶ Where a bill is made expressly payable at the drawer's own house, this is said to raise a presumption that it is accommodation paper.⁷ As has been more fully considered elsewhere, the contracts of drawer, acceptor and indorser are so many distinct contracts. From this it follows that if default is made in acceptance or payment of a bill of exchange at the place on which it is drawn, the contract of the drawer makes him liable for its payment at the place where it was drawn.⁸

¹ 3 & 4 Wm. IV. c. 98 §§ 4, 6.

² Geo. IV. c. 46 § 1 (A. D. 1825).

³ 3 & 4 Wm. IV. c. 83 § 2; 3 & 4 Wm. IV. c. 98 §§ 2, 3. By this latter act a banking partnership of more than six persons in, or within six miles of, London could not accept a bill drawn on it at less than six months, *Bank of England v. Anderson*, 3 Bing. N. C. 589.

⁴ 7 & 8 Vict. c. 32 § 26.

⁵ Chitty 174; 1 Daniel 99; Story on Bills § 48; *Mitchell v. Baring*, 10 B. & C. 4; S. C., 4 Car. & P. 35 (1829).

⁶ *Collins v. Tabatier*, 19 La. An. 299.

⁷ Byles 90; *Sharp v. Bailey*, 9 B. & C. 44; S. C., 4 M. & R. 4.

⁸ *Freese v. Brownell*, 6 Vroom 285 (1871); Story on Conf. Laws § 314. This is also the rule as to the indorser's contract, *Potter v. Brown*, 5 East

If a place of payment is named in a bill, the acceptance in blank is a contract to pay at that place. If no place be named, the acceptance, like the contract of one who makes a note, is to pay generally. An acceptor may, however, qualify and limit his contract to one for payment at a particular place. This he may do accepting "payable at," &c. or simply by adding his address to his signature.¹ But in England, an acceptor must now accept a bill specially payable at a specified place "only and not elsewhere," in order to qualify and limit his liability to payment at such place.²

§ 123. **Place of Payment in Memorandum—Blank.**—The place of payment is frequently expressed by a memorandum printed or written at the foot of the note or bill. A mere memorandum of this sort, intended for the direction of the holder, is not a part of the instrument.³ This must, however, depend in a measure on the intention and the circumstances of its making; when it was written and with what intention, are questions of fact for the jury.⁴ And it has been held that the addition of such a memorandum is a material alteration discharging an accommodation indorser, although made by the maker after receiving the note from the indorser and before discounting it.⁵ When the memo-

124; *Powers v. Lynch*, 3 Mass. 77; *Prentiss v. Savage*, 13 *Ib.* 20; *Hicks v. Brown*, 12 Johns. 142.

¹ *Chitty* 175; 1 *Pardessus* 354.

² 1 & 2 Geo. IV. c. 78; *Bytes* 90; *Chitty* 175; *Selby v. Eden*, 3 Bing. 611; S. C., 11 Moore 511; *Fayle v. Bird*, 6 B. & C. 531; 9 D. & R. 639. For constructions of the act of 1 & 2 Geo. IV. c. 78, see *Rowe v. Young*, 2 Brod. & B. 165; *Siggars v. Nicholls*, Bail Court H. T. 1839, 3 Jur. 34. See, also, notes § 126 *infra*.

³ *Bytes* 90; *American Nat. Bank v. Bangs*, 42 Mo. 450 (1868). See, too, *Bank of America v. Woodworth*, 18 Johns. 315; reversed, 19 Johns. 391. And see *contra*, *Tuckerman v. Hartwell*, 3 Me. 147 (1824), where the memorandum was made by the acceptor at the time of the acceptance. And it seems that even in England it is not necessary to make presentment at the place designated in such memorandum, *Price v. Mitchell*, 4 Campb. 200; *Exon v. Russell*, 4 M. & S. 506; *Williams v. Waring*, 10 B. & C. 2; S. C., 5 M. & R. 9. But such a presentment is sufficient, *Kent, C.*, in *Woodworth v. Bank of America*, 19 Johns. 411 (1821).

⁴ *Tuckerman v. Hartwell*, *supra*.

⁵ *Woodworth v. Bank of America*, 19 Johns. 391 (1821), reversing *Bank of America v. Woodworth*, 18 Johns. 315. It is to be observed that Chancellor Kent, in the appellate court, sustained by an elaborate dissenting opinion the judgment of Spencer, C. J., in the court below.

randum is printed like the rest of the note, although below the signature, it is held to be part of it.¹

Sometimes a blank is left for the place of payment. When delivered by the maker in this condition, authority to fill it is implied as in case of other blanks, and a *bona fide* holder may fill the blank with such place as seems most convenient.²

§ 124. **Mistakes—Parol Evidence—Presumptions.**—If the place is incorrectly named, it may be corrected.³ It is said that where no place is mentioned, the parties may agree upon a place by parol.⁴ But parol evidence is not admissible to show a contemporaneous agreement as to a place of payment and that the same was omitted by mistake or fraud.⁵

¹Turnbull *v.* Thomas, 1 Hughes C. C. 172 (1875). And in such a case a special presentment at that place has been held necessary in England, Trecothick *v.* Edwin, 1 Stark. 468. And a printed memorandum in blank on the back of a railroad bond, referred to in the body of the instrument as left to be filled in with a place of payment by the president, must be so filled before the bond can become negotiable, Parsons *v.* Jackson, 9 Otto 434 (1878).

²Redlich *v.* Doll, 54 N. Y. 234 (1873); McGrath *v.* Clark, 56 *Ib.* 34 (1874); Waggoner *v.* Eager, 8 Hun 142 (1876); Kitchen *v.* Place, 41 Barb 465 (1864); Marshall *v.* Drescher, 68 Ind. 359 (1879); Gillaspie *v.* Kelley, 41 *Ib.* 158 (1872); Shepard *v.* Whetstone, 51 Iowa 457 (1879). And a blank acceptance may be filled in payable at a particular place, Todd *v.* Bank of Kentucky, 3 Bush 626 (1868). But where no blank has been intentionally left, the insertion of a place of payment in a bill of exchange or promissory note is an alteration which makes it void, Simpson *v.* Stackhouse, 9 Penna. St. 186 (1848); Morehead *v.* Parkersburg Nat. Bank, 5 W. Va. 74; McCoy *v.* Lockwood, 71 Ind. 319 (1880). In Marshall *v.* Drescher, 68 *Ib.* 359, the blank space followed the printed words "payable at." Where the amount is determinable by the place of payment, which is to be indorsed on a corporation bond by its president, the blank left for that purpose in a printed indorsement signed by him, cannot be filled without special authority, Parsons *v.* Jackson, 9 Otto 434 (1878).

³Bank of Missouri *v.* Vaughan, 36 Mo. 90 (1865). In this case the Bank of the State of Missouri, at St. Louis, was held to be intended by the "Bank of Missouri, at," &c. See, too, Stix *v.* Matthews, 63 Mo. 371 (1876).

⁴Meyer *v.* Hibsher, 47 N. Y. 265 (1872); Pearson *v.* Bank of Metropolis, 1 Pet. 89 (1828). In this case it is said by Marshall, C. J.: "This is not an attempt to vary a written instrument. The place of demand is not expressed on the face of the note, and the necessity of a demand on the person when the parties are silent, is an inference of law, which is drawn only when they are silent. A parol agreement puts an end to this inference and dispenses with a personal demand."

⁵Specht *v.* Howard, 16 Wall. 564 (1872); Spitler *v.* James, 32 Ind. 202 (1869); Pierce *v.* Whitney, 29 Me. 188 (1848).

Neither can the place of date be assumed to be the place of payment in the absence of other express provision.¹ And making a note negotiable at a certain place is not the same thing as making it payable there.²

§ 125. **Several Places Named—Pleading.**—A bill or note may, however, be made payable at one of two or more places, and in such case the maker has the choice of place unless expressly given to the holder.³ But where it is made payable “at any bank in Savannah,” or “at either bank in Boston,” presentment at any bank there is sufficient.⁴ And in such case the holder need not give notice to the maker where he will present it.⁵ Where a note was made payable either in Colorado or Nevada, the option thus left as to the place of payment was held to defeat the construction of the instrument as a Nevada contract governed by the Nevada statute of limitations.⁶

Care should be observed as to the description of the note or bill in the pleadings in this respect. Thus, it has been held to be a variance, if a corporation note, dated in Chicago and payable “at the office,” be described in the declaration as payable at the Cook county office, there being two offices and the one not in Cook county having been intended.⁷ Where a bank is named as the place of payment, this does not, it

¹ *Lightner v. Will*, 2 Watts & S. 140 (1841); *Taylor v. Snyder*, 3 Den. 145 (1846); *Blodgett v. Durgin*, 32 Vt. 361 (1859); *Anderson v. Drake*, 14 Johns. 114; *Bank of America v. Woodworth*, 18 *Ib.* 322; *Pierce v. Whitney*, 29 Me. 188 (1848); S. C., 22 *Ib.* 113. From such date, however, it has been inferred that the maker contemplated payment at that place, *Stewart v. Eden*, 2 Caines 121; *Bullard v. Thompson*, 35 Tex. 313 (1871); *Orcutt v. Hough*, 54 N. H. 472 (1874); and that such was *prima facie* the place of payment, *Picketts v. Pendleton*, 14 Md. 320 (1859).

² *Pearson v. Bank of Metropolis*, 1 Pet. 89 (1828). Neither will it render a note non-negotiable elsewhere to make it “negotiable and payable at B.,” *Schobarie Co. Bank v. Bevard*, 54 Iowa 257.

³ *Womack v. Jenkins*, 17 Ind. 137 (1861); *Wilcox v. Williams*, 5 Nev. 206 (1871); and see, *Pollard v. Herries*, 3 Bos. & P. 335 (1803).

⁴ *Boit v. Corr*, 54 Ala. 112 (1875); *Allen v. Avery*, 47 Me. 287 (1859).

⁵ *Allen v. Avery*, 47 Me. 287 (1859); *Brickett v. Spalding*, 33 Vt. 107 (1860), unless the maker select a particular bank and notify the holder, or call upon the holder to make a selection. “At any bank in Boston,” refers, however, only to incorporated banks, *Way v. Butterworth*, 106 Mass. 75 (1870); S. C., 108 Mass. 509 (1871).

⁶ *Wilcox v. Williams*, 5 Nev. 206 (1871).

⁷ *Childs v. Laffin*, 55 Ill. 156 (1870).

seems, make the bank an agent for collection of the money.¹ But, in the language of Chief Justice Marshall, "by making a note negotiable in bank the maker authorizes the bank to advance on his credit to the owner of the note the sum expressed on its face."²

If a bill or note is made payable at a particular place, the failure to set this out in the declaration constitutes a variance.³ In Alabama, nevertheless, a different rule prevails by statute unless a bill or note is made payable at a certain place and there only.⁴

§ 126. **Presentment, how far Governed by Designation of Place.**—It was formerly laid down as the rule that the place of payment mentioned in a bill or note governed both the matter of presentment and of pleading;⁵ and that if the bill or note mentioned the place of payment, presentment there was necessary to hold the drawer or maker.⁶ This rule was subsequently extended by the House of Lords to bills payable generally on their face, but accepted payable at a particular place.⁷ This decision led, in England, to the passage of an Act of Parliament, already mentioned, which provides that "if any person shall accept a bill of exchange payable at the house of a banker or other place without further expression

¹ *Hills v. Place*, 48 N. Y. 520 (1872); *Caldwell v. Evans*, 5 Bush 380 (1869). A contrary doctrine seems to have been held in *Griffin v. Rice*, 1 Hilt. 184 (1856).

² *Mandeville v. Union Bank*, 9 Cranch 9 (1815).

³ *Lowe v. Bliss*, 24 Ill. 168; *Hodge v. Fillis*, 3 Campb. 463; *Sebree v. Dorr*, 9 Wheat. 558 (1824). So, too, the setting out of a place of payment not named in the bill, *Exon v. Russell*, 4 M. & S. 505 (1816); or of the wrong place, *c. p.* where a note was payable "at the office" and there were two offices of which the one not intended was designated in the pleadings, *Childs v. Latin*, 55 Ill. 156 (1870).

⁴ *Ala. Stat.*, 1872-73 p. 111; *Clark v. Moses*, 50 Ala. 326 (1874). So, *Montgomery v. Elliott*, 6 Ala. 701 (1844), the defendant being left to disprove such a demand as matter of defense. By the act of 1872, bills of exchange and notes, payable in money at a bank or at a certain place therein designated, are governed by the commercial law, *Oates v. Nat. Bank*, 11 Otto 239 (1879).

⁵ *Byles* 90; *Saunderson v. Bowes*, 14 East 500; *Roche v. Campbell* 9 Campb. 247.

⁶ *Byles* 91; *Gibb v. Mather*, 8 Bing. 214; *S. C.*, 1 Moo. & Sc. 387; *S. C.*, 2 G. & J. 254; *Hodge v. Fillis*, 3 Campb. 463.

⁷ *Rowe v. Young*, 2 Bred. & Bing. 165 (1820); *S. C.*, 2 Bligh 391.

in his acceptance, such acceptance shall be deemed and taken to be, to all intents and purposes, a general acceptance of such bill; but if the acceptor shall, in his acceptance, express that he accepts the bill payable at the banker's house or other place *only and not otherwise or elsewhere*, such acceptance shall be deemed and taken to be, to all intents and purposes, a qualified acceptance of such bill, and the acceptor shall not be liable to pay the said bill, except in default of payment, when such payment shall have been demanded at such banker's house or other place."¹ This act extends, however, only to actions against the acceptor.² To hold the drawer, presentment at the place of payment named in the bill is still necessary in England.³ This is likewise the English rule as to the liability of the maker of a promissory note, which mentions a place of payment, the statute of 1 and 2 Geo. IV. having no application to notes.⁴ A mere memorandum, however, at the foot of a bill or note, though proved to have been there before the signatures, has not the same effect as mention of the place of payment in the body of the instrument, and presentment at the place named in such memorandum, is not necessary;⁵ even though the memorandum be printed.⁶ But the separation of such words

¹ Chitty 332; Byles 215; 1 & 2 Geo. IV. c. 78. And the act extends to an action by the drawer against the acceptor of a bill drawn, payable in London and accepted payable "at W. Metcal Esq. Coal Exchange," without the statutory words, *Payable at Bldg. & C. 531*; S. C. 9 D. & R. 439; S. C., 2 Car. & P. 303 (1827); *Selby v. Eden*, 3 Bing. 611; S. C., 11 Moore 511. See, too, *Turner v. Haydon*, 4 B. & C. 1 (1829); S. C. Ry. & Moo. 215.

² Byles 215; Chitty 176; *Gibb v. Mathew*, 8 Brog. 214; *Parks v. Edges*, 1 Car. & M. 429; S. C., 3 Tyrw. 384; *Harris v. Parker*, *Id.* 370; *Boydell v. Harkness*, 3 C. B. 168; *Walker v. Cobley*, 2 Car. & M. 151; S. C., 4 Tyrw. 87.

³ Chitty 176; *Saul v. Jones*, 1 F. & El. 59; *Gibb v. Mathew*, *supra*; *Ambrise v. Hopwood*, 2 Taunt. 61; *Garnett v. Woodcock*, 1 Stark. 475.

⁴ Byles 216; Chitty 177; 1 Edwards 183; *Saunderson v. Bowes*, 14 East 507; *Howe v. Bowes*, 10 Ib. 112; *Bowen v. Young*, 2 Brod. & Bing. 165; *Williams v. Waring*, 10 B. & C. 2; *Embley v. Dartnell*, 12 M. & W. 849; *Spudler v. Grellett*, 1 Exch. 384. But see *Nichols v. Bowes*, 2 Campb. 498.

⁵ Byles 90; Chitty 177; *Price v. Mitchell*, 4 Campb. 200; *Exon v. Russell*, 4 M. & S. 506; *Williams v. Waring*, 10 B. & C. 2; S. C., 5 M. & R. 9; *Wild v. Remnards*, 1 Campb. 245; *Callaghan v. Aylett*, 2 Ib. 551; *Saunderson v. Judge*, 2 H. B. 599; and see *Masters v. Barretto*, S. C. B. 439. As to the sufficiency of presentment at such place, see opinion of Chancellor Kent, in *Woodworth v. Bank of America*, 19 Johns. 411 (1821).

⁶ Chitty 177; *Trentham v. Edm.*, 1 Stark. 468.

from the body of the note by a period, *e. g.* "At M. L.," does not make them a mere memorandum, when they are part of the note and necessitate presentment there.¹ Presentment at the place of payment mentioned in the bill or note being, as we have seen, requisite in England, it should be averred in the pleading to have been so made;² although this has been questioned in some earlier cases.³

§ 127. The American rule differs from the English one both as to presentment and pleading. That is to say, presentment at the place named for payment in a bill or note is not necessary in order to charge maker, drawer or acceptor.⁴ From this it follows that it is unnecessary to aver such presentment in the declaration against such parties.⁵ Presentment at the place named is, however, often necessary to the recovery of costs and damages against any party.⁶ And if the maker or acceptor can show that any injury has been caused him by failure to make presentment and demand payment at the place mentioned in the instrument, it seems that he may avail himself of such matter of defense.⁷ And nothing in

¹ *Vander Donckt v. Thellerston*, 8 C. B. 812 (1849).

² *Saunderson v. Bowes*, 14 East 498; *Dickinson v. Bowes*, 16 *Ib.* 108; *Bowes v. Howe*, 5 Taunt. 30; *Ambrose v. Hopwood*, 2 *Ib.* 61; *Callaghan v. Aylett*, 3 *Ib.* 397; *Gammon v. Schmoll*, 5 *Ib.* 344; *Rowe v. Young*, 2 Brod. & Bing. 165 (1820); *Cowie v. Halsall*, 4 B. & Ald. 197 (1821). At least as to promissory notes, *Chitty* 404.

³ *Saunderson v. Judge*, 2 H. Bl. 509; *Fenton v. Goundry*, 13 East 459; *Lyon v. Sundius*, 1 Campb. 423; *Head v. Sewell*, 1 Holt 363; *Rowe v. Williams*, *Ib.* 363 *n.*

⁴ *Bank of U. S. v. Smith*, 11 Wheat. 171 (1826); *Wallace v. McConnell*, 13 Pet. 136 (1839); *Foden v. Sharp*, 4 Johns. 183 (1809); *Wolcott v. Van Santvord*, 17 *Ib.* 248 (1819); *Caldwell v. Cassidy*, 8 Cow. 271 (1823); *Watkins v. Crouch*, 5 Leigh 522 (1834); *Bowie v. Duvall*, 1 Gill & J. 175; *Ruggles v. Patton*, 8 Mass. 480; *Herring v. Sanger*, 3 Johns. Cas. 71; *Haxtun v. Bishop*, 3 Wend. 13 (1829); *Blair v. Bank of Tennessee*, 11 Humph. 88; *McNairy v. Bell*, 1 Yerg. 502 (1831); *Mulherrin v. Hannum*, 2 *Ib.* 81 (1821); *Weed v. Van Houten*, 4 Halst. 189 (1827); *Fuller v. Dingman*, 41 Iowa 506 (1875).

⁵ *Wolcott v. Van Santvord*, 17 Johns. 248 (1819); *Carley v. Vance*, 17 Mass. 389; *Weed v. Van Houten*, 4 Halst. 189 (1827). And see remarks of Thompson, J., to the same effect in *Bank of United States v. Smith*, 11 Wheat. 175.

⁶ *Caldwell v. Cassidy*, 8 Cow. 271 (1823); *Wolcott v. Van Santvord*, 17 Johns. 248 (1819); *Fuller v. Dingman*, 41 Iowa 506 (1875).

⁷ *Nichols v. Pool*, 2 Jones 23 (1854). And in Louisiana such failure is no defense without proof of special damage, *McCalop v. Fluker*, 12 La. An. 551 (1877).

this section is to be understood as affecting the rights of an indorser to require presentment at the place designated.¹

§ 128. **American Statutes as to Place of Payment.**—Provisions for payment at bank and other provisions relating to place of payment are made by statute in some of the States.² Thus, by the Indiana statute a note is not governed by mercantile law unless made payable at a bank in that State.³

¹Ferner v. Williams, 39 Barb. 9 (1861).

²In *Alabama* promissory notes to be negotiable must be made payable "at a bank or private banking house," Code of 1876 § 2100. But by the act of 1873 all "bills and notes payable at a banker's or a designated place of payment, are negotiable instruments," Oates v. National Bank, 10 Otto 239 (1879). In *California* "a negotiable instrument may be with or without designation of the place of payment" (Civ. Code 1872 § 8091), and "a negotiable instrument which does not specify a place of payment is payable at the residence or place of business of the maker, or where he may be found" (*Ib.* § 8100). In *Dakota* the provisions of the California Code have been copied (Rev. Code 1877 §§ 1825, 1831). In *Indiana* promissory notes, to be negotiable independent of equities, must be payable to order or bearer and in a bank in Indiana (1 R. S. 1876, Davis' Ed., c. 177 § 6). But if payable at a particular place, demand at such place need not be pleaded or proved (2 *Ib.* p. 76 § 82). In *Kentucky* only such promissory notes as are made payable and negotiable at a bank incorporated by Kentucky law, and are indorsed and discounted by the said bank or some other bank in Kentucky, are negotiable like foreign bills of exchange (1877 G. S. c. 22 § 21). All other bonds, bills and notes, whether for money or property, are assignable subject to defense (*Ib.* § 6). In *Virginia* (1873 Code c. 141 § 7; 1 R. C. 483 § 2), and in *West Virginia* (1879 R. S. c. 12 § 7), negotiable notes and checks must be made payable in the State "at a particular bank, or at a particular office thereof for discount and deposit, or at the place of business of a savings institution or savings bank, or at the place of business of a licensed broker." And see *Bank of Huntington v. Hysell*, 22 W. Va. 142 (1883). As to the construction of these statutes, see *Freeman's Bank v. Ruckman*, 16 Gratt. 126 (1860); *Bradley v. Patton*, 51 Ala. 108 (1874); *Cook v. Mut. Ins. Co.*, 53 *Ib.* 37 (1875); *Holloway v. Porter*, 46 Ind. 62 (1874); *Parkinson v. Finch*, 45 Ind. 122 (1873); *Musselman v. McElhenny*, 23 *Ib.* 4 (1864); *Stapp v. Anderson*, 1 A. K. Marsh. 398 (1819); *Jones v. Wood*, 3 *Ib.* 162 (1820).

³*Woodward v. Matthews*, 15 Ind. 339 (1860); *Bremmerman v. Jennings*, 60 *Ib.* 175 (1877); *Crossan v. May*, 63 *Ib.* 242 (1879); *Zook v. Simonson*, 72 Ind. 83 (1880); *Ruddell v. Phalar*, *Ib.* 533; *Woolen v. Whitacre*, 73 *Ib.* 198; *Woolen v. Wise*, *Ib.* 212. But if transferred by delivery only, such note is subject to equities, *Foreman v. Beckwith*, 73 *Ib.* 515 (1881). And if the bank has ceased to exist before the transfer of the note, it becomes non-negotiable, *Brown v. Hull*, 33 Gratt. 23 (1880). A note "payable at the Indiana Banking Company of Indianapolis" is not, however, entitled to the protection of the statute as a negotiable note, *Rominger v. Keyes*, 73 Ind. 375 (1881); nor a note payable "at the bank at Goshen," without more particular designation, *Butterfield v. Davenport*, 84 Ind. 590 (1882); although there may be only one bank in the place, *Hardy v. Brier*, 91 *Ib.* 91 (1883). If payable at a New York bank it is not governed by the *lex mercatoria*, *Mix v. State Bank*, 13 Ind. 521 (1859). And it seems that the statute of Anne is not in force in Indiana, and notes depend for their commercial qualities wholly on the Indiana statute, *Mix v. State Bank*, *supra*; *Hunt v. Standart*, 15 Ind. 33, 160 (1860).

The courts in that State, however, favor the presumption that if a bank is mentioned, without designating its location, it is an Indiana bank.¹ Prior to 1843 negotiable notes in Indiana had to be paid at a chartered or incorporated bank, and if not so payable, could not be transferred by delivery, although payable to bearer.² This has now been changed in Indiana,³ but is still the law of Kentucky.⁴ Where the bank named as place of payment is incorporated, the courts of the State by whose laws it is incorporated will take notice of that fact.⁵ But the courts will not in general take notice that the office of a firm in another State is a bank.⁶ Where a bank is required by the statute, the name of a fictitious bank is no compliance.⁷ The name may, however, be left blank and filled in afterward, as in the case of other blanks.⁸ It has been further held in Indiana that notes payable to order are negotiable, although not payable in bank;⁹ and that notes which are non-negotiable under the statute are nevertheless assignable,¹⁰ though subject to defense;¹¹ but that they are not *prima facie* payment of prior indebtedness like negotiable notes.¹²

¹Indianapolis, &c., Mfg. Co. v. Caven, 53 Ind. 258 (1876); and especially if payable at the "City Bank, Shelbyville, Ind.," Henderson v. Ackelmine, 59 Ind. 540 (1877); Burroughs v. Wilson, *Ib.* 536 (1877); Roach v. Hill, 54 *Ib.* 245 (1876); Walker v. Woolen, *Ib.* 164.

²Ind. R. C. 1831 p. 93; McNitt v. Hatch, 4 Blackf. 531 (1838).

³Davis v. McAlpine, 10 Ind. 137 (1858); Reed v. Trentman, 53 *Ib.* 438 (1876). And it need not be a national bank, Reed v. Trentman, *supra*.

⁴Campbell v. Farmer's Bank, 10 Bush 152 (1872); Act of 1850 p. 8; 1877 G. S., c. 22 § 21. See, too, Payne v. Bank of Bowling Green, 10 Bush 176.

⁵Gordon v. Montgomery, 19 Ind. 110 (1862). But see, Salmons v. Hoyt, 53 Ga. 493 (1874).

⁶Crossan v. May, 68 Ind. 242 (1879).

⁷Parkinson v. Finch, 45 Ind. 122. And in such case the maker is not estopped from showing the designated bank to be a fictitious one, Parkinson v. Finch, *supra*. But see, *contra*, Hall v. Harris, 16 *Ib.* 180 (1861).

⁸Spitler v. James, 32 Ind. 203 (1869); Gillaspie v. Kelley, 41 *Ib.* 158 (1872). And at suit of a *bona fide* holder such filling of a blank, though made in disregard of a verbal agreement between the original parties, binds the maker, Spitler v. James, *supra*.

⁹Snyder v. Oatman, 16 Ind. 265 (1861).

¹⁰Parkinson v. Finch, 45 Ind. 122 (1874); King v. Vance, 46 *Ib.* 246.

¹¹Reagan v. Burton, 67 Ind. 347 (1879); Woodward v. Matthews, 15 *Ib.* 339 (1860).

¹²Lindeman v. Rosenfield, 67 Ind. 246 (1879).

CHAPTER V.

FORM—THE PARTIES DESIGNATED.

I. The Maker or Drawer.

II. The Payee.

III. The Drawee.

I. THE MAKER OR DRAWER.

129. Name of Party—In General.
130. Execution by Partners.
131. by Agent—*Principal not Named.*
132. by Public Officer.
133. Official Signature—"Agent," &c.—Principal not Named.
134. Signature as "Executor"—"Administrator"—"Guardian."
135. *In Principal's Name*—Corporation and Official Signatures.
136. *Principal Named* only in Agent's Official Title in Body of Instrument.
137. in his Signature.
138. *Principal Indicated* by Corporation Seal or Paper.
139. by Words "on Behalf of," &c.
140. by Charging to his Account.
141. by Recital of Consideration Moving to Him.
142. by Form of Promise—"I Promise."
143. "We or Either of Us"—"Jointly and Severally."
144. by Agent's Promise "as" such.
145. *as Acceptor or Indorser* by Drawee's or Payee's Name.
146. Foreign Statutes as to Signature by Agent.
147. Parol Evidence—Disclosing Principal—Discharging Agent.
148. Maker's or Drawer's Name—Fictitious—Uncertain.
149. Joint and Several Notes.

§ 129. **Name of Party—In General.**—It is an essential requisite of all commercial paper that the parties to it should appear by name or other plain designation in the instrument itself. Thus, it must appear from the instrument who is to be bound by it as maker or drawer.¹ This is usually made apparent by the signature subscribed to the paper. It may, however, as we have seen, appear in the body of the instrument, *e. g.* "I, A. B., promise," &c., instead of at the bottom,² although this is unusual and cannot be recommended. And

¹ Daniel 101; 1 Edwards § 143; 1 Parsons 36; Story on Bills § 53; Story on Prom. Notes § 34.

² May v. Miller, 27 Ala. 515 (1855); Tevis v. Young, 1 Metc. 199 (Ky. 1858). See, also, Chapter III.

in some States it is required by statute that the name of maker or drawer be subscribed to the instrument.¹

Although in the absence of statutory provisions it may not be necessary for the name or the full name of the maker or drawer to appear, the person to be charged must be designated with certainty. Thus, it is not sufficient for a promissory note that it be signed "J. C. or else H. B."² A maker may, however, be bound by an assumed name,³ or by initials.⁴ But it has been held that one signing a fictitious name as maker for the accommodation of the payee is not liable on the instrument, as no credit was given to him.⁵ Some foreign statutes require that the name of the maker or drawer be expressed in full.⁶ And this is recommended as the only satisfactory rule in the matter. In practice, however, it is far from being generally observed.

§ 130. **Execution by Partners.**—A firm note or bill should be signed in the firm name, and if signed by the partners in their individual names, it is not a partnership note or bill and is no evidence of a partnership debt.⁷ But a firm has been held on a note made by the partners in their individual names before the adoption of a firm name for the benefit of the firm, and entered as a firm transaction in

¹See Chapter III.

²Ferris v. Bond, 4 B. & Ald. 679. See, too, Wilkinson v. Lutwidge, Stra. 648.

³Melledge v. Boston Iron Works, 5 Cush. 158 (1849).

⁴See Chapter III. And a party signing a bill, note or check by initial or contraction of his Christian name may be sued in the same way in New Jersey (2 R. S. 187 and p. 852 § 28; 1870 P. L. 59).

⁵Bartlett v. Tucker, 104 Mass. 336 (1870).

⁶See Chapter III.

⁷Byles 44; Gay v. Johnson, 45 N. H. 587 (1864); Buffum v. Seaver, 16 Ib. 160 (1844). At least such note is not *prima facie* a firm note, Richardson v. Huggins, 23 N. H. 106 (1851). But unless there be evidence of a partnership and no evidence of a partnership name other than that signed, a note signed with the full names of the partners, F. C. and R. C., is *prima facie* a firm note, although it appear that, in two instances, the name of "F. & R. Cleveland" had been used, McGregor v. Cleveland, 5 Wend. 475 (1830). But such a note, given after the dissolution of a partnership as a substitute for a previous partnership note, does not make the debt an individual debt, Maynard v. Fellows, 43 N. H. 255 (1861). As to the power of a partner to bind his firm by signing the full individual names instead of the firm name, see Norton v. Seymour, 3 C. B. 792; McClae v. Sutherland, 3 El. & Bl. 36; Chitty 72.

its books.¹ A note made by an individual partner in the firm name is *prima facie* the act of the firm done in the course of its partnership business.² And even where there is no firm, a negotiable instrument executed by B. in the firm name of "A. & Co.," with A.'s knowledge, will be binding upon both persons as partners.³

The firm name may, indeed, be the individual name of one of the partners, and partnership paper executed in that name will of course bind the firm.⁴ In such case, however, a bill drawn in that name, although in the firm business and for the benefit of the firm, is *prima facie* the bill of the individual partner and the burden is on the holder to show its partnership character.⁵ But although it is not addressed to

¹Kitner v. Whitlock, 88 Ill. 513 (1878).

²Adams v. Ruggles, 17 Kans. 237 (1876); Hamilton v. Summers, 12 B. Mon. 11 (1851); Thurston v. Lloyd, 4 Md. 283 (1853); Manning v. Hays, 6 Ib. 5 (1854); Miffin v. Smith, 17 Serg. & R. 165 (1828); Ensminger v. Marvin, 5 Blackf. 210 (1839); Carrier v. Cameron, 31 Mich. 373 (1875); National Union Bank v. Landon, 66 Barb. 193 (1870). Thus, it is said by Chancellor Walworth, in Whitaker v. Brown, 16 Wend. 507 (1836): "A note given by one partner, in the name of the firm, is of itself presumptive evidence of the existence of a partnership debt, as each partner has a general authority to contract debts in the business of the firm. The burden of proof, therefore, lay upon the plaintiff in this case to show that this note was not given for such a debt." The same rule applies to indorsements in a firm name. Morehead v. Gilmore, 77 Penna. St. 118 (1874). And it is said by Judge Marshall, in Hamilton v. Summers, 12 B. Mon. 12, that "the belief of the payee that the money was borrowed for individual purposes, though it might prove an intention on his part to do an unjust act, would have no effect in law, unless the fact correspond with his belief. And even if the money was avowedly borrowed for a private purpose with the knowledge of the payee, still if it was in fact used for the purpose of the firm, we are not prepared to say that the note executed in the firm name should not be binding upon all the partners."

³Smith v. Hill, 45 Vt. 90 (1872).

⁴Byles 44; Chitty 56. 73; Bank of South Carolina v. Case, 8 B. & C. 427 (1828); S. C., 2 Man. & Ry. 459; Smith v. Craven, 1 Crompt. & J. 507; Nicholson v. Ricketts, 29 L. J. Q. B. 55; *Ex parte Bolitho*, Buck 100; Wintle v. Crowther, 1 Tyrw. 214; Lloyd v. Ashby, 2 B. & Ad. 29; Nicholson v. Patton, 2 Cranch C. C. 164 (1819); Kinsman v. Dallam, 5 T. B. Mon. 382 (1827); Macklin v. Crutcher, 6 Bush 401 (1869). The name adopted by the partnership seldom contains the names of all the partners. It may even be a name containing none of the individual names. The firm name will, however, bind all the members of the firm whether their names appear or not. Thus, four partners may do business in the name of two, and all be bound by a note in that name, Voorhees v. Jones, 5 Dutch. 270 (1861). Or the individual name may be used by the firm only for some special purpose such as a bank account. Where this is the case the firm is liable on a check drawn on such account by the individual partner, Crocker v. Colwell, 46 N. Y. 212 (1871).

⁵Mason v. Rumsey, 1 Campb. 384; Bank of South Carolina v. Case, *supra*; *Ex parte Bolitho*, Buck 100; Smith v. Craven, 1 Crompt. & J. 507.

the place of business of the firm, a bill drawn in such manner on the firm and for its benefit and accepted by the other partner binds the firm.¹ And a suit may be maintained against B., as partner with A., on a note made in the name of A., upon admissions of B. as to the consideration and partnership.²

On the other hand, where the partnership business is in the name of one partner and he obtains the discount of a bill in his own name, from a payee having no knowledge of the partnership, and in fraud of the firm, the partnership will not be bound.³ And if a firm consisting of J. B. and H. carries on its business in the individual name of "J. B.," a bill drawn by H. in the name of "J. B. & Co." will not bind the firm.⁴

Where there is an ordinary firm name, a bill discounted for the benefit of the firm in the name of one of the part-

Buckner *v.* Lee, 8 Ga. 285 (1850); Bank of Rochester *v.* Monteath, 1 Denio 402 (1845); Manufacturers' Bank *v.* Winship, 5 Pick. 11 (1827). But the opposite presumption was made in a similar case where there was no business carried on by the individual whose name was used, Yorkshire Banking Co. *v.* Beatson, L. R. 5 C. P. D. 109 (Ct. App. 1880), affirming L. R. 4 C. P. D. 204 (1879). A promissory note made to such firm is generally, in like manner, *prima facie* the property of the individual partner named, Boyle *v.* Skinner, 19 Mo. 82 (1853); Oliphant *v.* Mathews, 16 Barb. 608 (1853); United States Bank *v.* Binney, 5 Mason C. C. 176 (1828). In this case, Story, J., says, p. 184: "Where the business is carried on in the name of one of the partners and his name alone is the name of the firm, there, in order to bind the firm, it is necessary not only to prove the signature, but that it was used as the signature of the firm by a party authorized to use it on that occasion and for that purpose. * * * The proof of the signature is not enough. The plaintiffs must go further and show that it is a partnership signature." In such case "it was formerly held that the holder might charge the signing partner or the firm at his election," Byles 44; Hall *v.* Smith, 1 B. & C. 407; S. C., 2 D. & R. 484; Clerk *v.* Blackstock, Holt 474; March *v.* Ward, Peake 130; Wilks *v.* Back, 2 East 142. But see now, *Ex parte* Buckley, 14 M. & W. 469.

¹Stephens *v.* Reynolds, 5 H. & N. 513 (1860); 29 L. J. Ex. 278.

²Brannon *v.* Hursell, 112 Mass. 63 (1873). So, if corn be sold to a firm and a note given for it by one partner, who represents it as given on the firm account, it has been held to be binding on the firm, Seekell *v.* Fletcher, 53 Iowa 330 (1880).

³Yorkshire Banking Co. *v.* Beatson, L. R. 4 C. P. D. 204; 9 Cent. L. J. 453 (1879). See, too, *Ex parte* Husbands, 2 Glyn. & J. 4, where such bills were held to be provable in bankruptcy against the separate estates of both partners, but not against their joint estate.

⁴Faith *v.* Richmond, 11 Ad. & El. 339 (1840); Kirk *v.* Blurton, 9 M. & W. 284 (1841). The latter case was afterwards criticised in Stephens *v.* Reynolds, 5 H. & N. 513 (1860).

ners, will only bind the individual who signs it;¹ but in such a case the partnership may be held in an action for money had and received.² And where a draft upon a firm is accepted by one of the partners in his individual name, the acceptance has been said to bind neither the individual nor the firm.³ It is often a question of fact whether a bill or note is the promise of a firm or that of an individual. Thus, where a note read "I promise," &c., and was signed "Samuel W. Snow, Snow, Foote & Co.," the question as to whether it was the note of the individual or of the firm was left to the jury.⁴

As may be seen from these authorities, the general rule as to partnership paper requires the firm name to be used, if the firm is to be bound by the instrument. An apparent exception is admitted to this rule when the name of an

¹ Byles 44; Chitty 72; 1 Daniel 335; Siffkin v. Walker, 2 Campb. 308; Emly v. Lye, 15 East 7 (1812); Smith v. Craven, 1 Crompt. & J. 500 (1831); Nicholson v. Ricketts, 29 L. J. Q. B. 55; *In re Adanson* Fibre Co., L. R. 9 Ch. App. 635 (1874); Macklin v. Crutcher, 6 Bush 401 (1869), overruling Hykes v. Crawford, 4 Bush 19; Bank of Commerce v. Selden, 3 Minn. 155 (1859). Even although the proceeds be afterward used in the firm business, Tallmadge v. Penoyer, 35 Barb. 120 (1861). So, too, a bill drawn on one partner "on account of" the firm and by him accepted generally in his individual name, Cunningham v. Smithson, 12 Leigh 32 (1841). And a note made in such name will be treated as evidence of the creditor's election to trust the maker only, unless the note has been given in the firm business and for its benefit, and the credit appears to have been given to the firm, Foster v. Hall, 4 Humph. 346 (1843). But a note signed by one partner "for A. B. & Co.," will bind the firm, Staats v. Howlett, 4 Denio 559 (1847); Lord Galway v. Matthews, 1 Campb. 403. In like manner an acceptance, not for partnership purposes, in the name of "Dry & Co." will not be binding on the firm trading under the name of Dry & Everett, Sheppard v. Dry, Norwich 1840, cor. Parke, B., affirmed in Q. B.; cited in Byles 73 n.

² Ontario Bank v. Hennessy, 48 N. Y. 545 (1872).

³ Heenan v. Nash, 8 Minn. 407 (1862). But if a note is made payable to a firm in its firm name, an indorsement by one partner in his own name will avail as a transfer of the equitable, although not of the legal, title of the firm, Alabama Coal Mining Co. v. Brainard, 35 Ala. 476 (1860). And it has been held that a bill of exchange drawn on the firm by one of the partners in his own name, but for a partnership debt, amounts to an accepted bill by the firm and binds it as such, Dougal v. Cowles, 5 Day 511 (1813).

⁴ Sherwood v. Snow, 46 Iowa 481 (1877). The words "I promise," &c., in the body of a note signed in the firm name do not affect its character as a firm note, Doty v. Bates, 11 Johns. 544 (1814). So, too, Lord Galway v. Matthews, 1 Campb. 403; Smith v. Jarves, Ld. Raym. 1484. And where the individual names of all the partners are signed by one partner to a note beginning "I promise, &c., for A., B. & Co., A.," it is held, in England, that the signer A. is not severally liable, *Ex parte* Buckley, *In re* Clarke, 14 M. & W. 469 (1845), overruling Hall v. Smith, 1 B. & C. 407 (1823). A similar note, however, has been held to be joint and several in Massachusetts, Hemmenway v. Stone, 7 Mass. 58.

individual partner is used by the firm in its business as its firm name. There is also an exception in the case of a bill drawn on a firm and accepted by one partner in his own name for partnership purposes. Such an acceptance will bind the firm.¹ In this case the firm name of the drawee indicates with sufficient clearness the character of the acceptance.

§ 131. **Execution by Agent—Principal not Named.**—As has been said, the party to be charged by commercial paper must be shown by the instrument itself. This principle finds its most frequent application in contracts executed by agents. As to such instruments it is a general rule that the principal, for whom the agent acts, must appear in the paper, and that otherwise the agent executing it is individually liable on it as his own contract.² And this is true, although the instrument be given in the principal's business and for a consideration beneficial to him.³ This is illustrated by the case of a seller's agent taking a note for the goods payable to

¹ Byles 46; Chitty 73; 1 Parsons 123; *Mason v. Rumsey*, 1 Campb. 384; *Dolman v. Orchard*, 2 C. & P. 105. But see *contra*, *Heenan v. Nash*, 8 Minn. 407. See, too, p. 177 note 3, *supra*.

² Byles 37; Chitty 43; 1 Daniel 285; 1 Edwards § 77; 1 Parsons 92; Story on Prom. Notes §§ 65, 68; *Stackpole v. Arnold*, 11 Mass. 27; *Bank of Rochester v. Monteath*, 1 Denio 402 (1845); *Snelling v. Howard*, 51 N. Y. 373; S. C., 7 Robt. 400; *Hancock v. Fairfield*, 30 Me. 299 (1849); *Snow v. Goodrich*, 14 Ib. 235 (1837); *Graham v. Campbell*, 56 Ga. 258 (1876); *Bass v. Randall*, 1 Minn. 404 (1857); *Hopkins v. Blane*, 1 Call 361 (1798). But see, *Wolfe v. Jewett*, 10 La. 383 (1830); *Leadbitter v. Farrow*, 5 M. & S. 345; *Sowerby v. Butcher*, 2 C. & M. 268; 4 Tyrw. 320; *Alexander v. Sizer*, L. R. 4 Exch. 105; *Burrell v. Jones*, 3 B. & Ald. 47; *Bult v. Morrell*, 12 Ad. & El. 750; *Ducarry v. Gill*, Mood, & M. 450; S. C., 4 C. & P. 121; *Thomas v. Bishop*, 2 Stra. 955; *Frontin v. Small*, Ib. 705; *Wilks v. Back*, 2 East 142; *Barlow v. Bishop*, 1 Ib. 434; S. C., 3 Esp. 266; *White v. Cayler*, 6 T. R. 176; *Goupy v. Harden*, 7 Taunt. 159; *Appleton v. Binks*, 5 East 148; *In re Adanson*, 43 L. J. Ch. 734 (1874). And even although known by the other party to be acting merely as an agent of others, *French v. Price*, 24 Pick. 13 (1833); *Hastings v. Lovering*, 2 Ib. 214 (1824); Story on Prom. Notes § 65. But a bill drawn on the principal but accepted by the agent in his own name, has been held to be binding on the principal, *Lindus v. Bradwell*, 5 C. B. 583. And see, *Gurney v. Evans*, 3 H. & N. 122; S. C., 27 L. J. Exch. 166; *Edmunds v. Bushell*, 35 L. J. Q. B. 91. And the same rule applies to other simple contracts, *Buffum v. Chadwick*, 8 Mass. 103 (1811); *Arfridson v. Ladd*, 12 Ib. 173 (1815); *Allen v. Rostain*, 11 Serg. & R. 362 (1824); *Blakeman v. McKay*, 1 Hilt. 266 (1856); *Davenport v. Riley*, 2 McCord 198 (1822); *Rollins v. Phelps*, 5 Minn. 463 (1861); *Hastings v. Lovering*, *supra*.

³ *Bradlee v. Boston Glass Co.*, 16 Pick. 347; *Snow v. Goodrich*, 14 Me. 235 (1837); *Crum v. Boyd*, 9 Ind. 289 (1857).

himself individually and indorsing it over to his principal,¹ or drawing in his own name on the purchaser in favor of his principal.² The agent is individually liable on such an instrument, although he had authority from his principal to give the bill or note in question for the principal;³ and notwithstanding subsequent ratification of his act by the principal;⁴ and notwithstanding that the principal may have been disclosed and the maker known to be but an agent;⁵ and even though a direction be added to charge to the account of the principal.⁶ And the principal is not liable

¹Heuback v. Mollmann, 2 Duer 227 (1853). But in such case the agent's indorsement to his principal does not make him liable individually to the principal, Sharp v. Emmet, 5 Whart. 288 (1839). He is, however, liable on such an indorsement even to his principal, if acting under a *del credere commission*, Mackenzie v. Scott, 6 Bro. P. C. 280; Goupy v. Harden, 7 Taunt. 160; 2 Marsh. 454. In *Denmark* (1825 Exch. Law § 14) an agent buying a bill of exchange for, and indorsing it to, his principal, is individually liable to all persons except the principal.

²In this case he is liable even to his principal on such a bill, Le Fevre v. Lloyd, 5 Taunt. 749. But not if the transaction was known to and accepted by the principal, Jones v. Lathrop, 44 Ga. 398 (1871); Kimmel v. Bittner, 62 Penna. St. 203 (1869). And see, Sharp v. Emmet, *supra*.

³Bradlee v. Boston Glass Co., 16 Pick. 347; Snow v. Goodrich, 14 Me. 235 (1837). But *contra*, if he signed as agent and was authorized to do so, Bank of Cape Fear v. Wright, 3 Jones L. 376 (1856).

⁴Sturdivant v. Hull, 59 Me. 172 (1878). But where a contract was made by "C. L., as agent for and on the part and behalf of S. R.," and afterward ratified in writing by S. R., although C. L. have signed it simply with his individual name, he cannot be holden on it, Spittle v. Lavender, 2 Brod. & Bing. 224 (1821). And it is well established that the principal may render himself liable upon a contract made by the agent in his own name by subsequent ratification of it, Evans v. Wells, 22 Wend. 324 (1839).

⁵1 Parsons 93; Arnold v. Sprague, 34 Vt. 402 (1861); Bedford Ins. Co. v. Covell, 8 Metc. 442 (1844); Collins v. Buckeye State Ins. Co., 17 Ohio St. 215 (1867); Andrews v. Allen, 4 Harr. 452 (Del. 1847). So, in a contract of sale signed by an auctioneer, Mills v. Hunt, 20 Wend. 431 (1838). But in Louisiana an agent executing a note in his individual name with no additional words of agency is not held liable, if his principal was known to the payee at the time of making the note, Milligan v. Lyle, 24 La. An. 144 (1872). So, too, where the drawer signed a bill as agent of the drawee in his individual name, with the knowledge of the payee and in the drawee's business, he was held not individually liable in Roberts v. Austin, 5 Whart. 313 (1839).

⁶Byles 37; Goupy v. Harden, 7 Taunt. 160; 2 Marsh. 454; Leadbitter v. Farrow, 5 M. & S. 345; Bank of British N. Am. v. Hooper, 5 Gray 537 (1856); Bass v. O'Brien, 12 Gray 477 (1859), the principal referred to in this case being the "bark Dublin;" Mayhew v. Prince, 11 Mass. 54 (1814); Newhall v. Dunlap, 14 Me. 180 (1837); Snow v. Goodrich, *Id.* 235; Tammatt v. Rocky Mtn. Nat. Bank, 1 Col. 278 (1871), the drawer in this case being agent for the drawee, but adding no words indicative of agency to his individual signature. This case was disapproved in Hagar v. Rice, 4 Col. 90 (1878). And to like effect see Maker v. Overton, 9 La. 115 (1835), Martin, J., saying: "We are of opinion that the agency of the drawer is apparent

on a note or bill given by his agent in his individual name, although he has admitted the agent's authority.¹ But if such bill or note was given in the principal's business and for his benefit, he can be held in an action for the original consideration;² unless he has been discharged by the act of the payee. And the payee's taking the agent's note with full knowledge of the agency and of the principal's liability is construed to be such an act, amounting as it does to a choice of the agent as debtor instead of the principal.³

§ 132. **Execution by Public Officer.**—An exception is made to the rule of an agent's individual liability in favor of public officers, acting in their public capacity with the knowledge of the other contracting party. In such case the officer is not individually liable, *in whatever manner* he may make the contract or sign the bill of exchange, draft or note in question. An official designation is not necessary in the instrument itself for his protection, but it is usual and advisable to add such title. In all contracts by a public officer it is presumed that a party dealing with him as such gives credit to the government represented and not to the individual.⁴ A public officer may, however, become liable by

on the face of the bill. This clearly results from the tenor of it, in which the plaintiffs are directed to charge the same to the account of the steamer U. S. and which excludes or negatives the idea of a personal charge." And see, as to the effect of such a clause in other cases, § 140 *infra*.

¹Brown v. Parker, 7 Allen 337 (1863). But the principal can be held by a ratification of his agent's act, Walter v. Trustees, 12 Ill. 64 (1850); Paul v. Berry, 78 Ib. 158 (1875); Dow v. Spenny, 29 Mo. 386 (1860); First Nat. Bank v. Gay, 63 Ib. 33 (1876). And see Mechanics' Bank v. Bank of Columbia, 5 Wheat. 326 (1820), where a cashier signed a check simply in his individual name and parol evidence was admitted to hold the bank for the act as theirs.

²1 Parsons 93.

³Hyde v. Paige, 9 Barb. 150 (1850); Ranken v. De Forest, 18 Ib. 143 (1854).

⁴As to the rule that a public officer is not individually liable on his contracts made in that capacity, see Chitty 44; 1 Daniel 417; 1 Parsons 122; Story on Prom. Notes § 65; Mackbeth v. Haldimand, 1 T. R. 172; Unwin v. Wolseley, Ib. 674; Myrtle v. Beaver, 1 East 135; Rice v. Chute, Ib. 579; Allen v. Waldgrave, 2 Moore 627; Gidley v. Palmerstone, 7 Ib. 91; S. C., 3 Brod. & Bing. 275; Prosser v. Allen, Gow. 117; Jones v. Le Tombe, 3 Dall. 384 (1798); Hodgson v. Dexter, 1 Cranch 345; Bank of Kentucky v. Sanders, 3 A. K. Marsh. 184 (1820); Amison v. Ewing, 2 Coldw. 366 (1865). This is true as to contracts in general, Brown v. Austin, 1 Mass. 208 (1804); Freeman v. Otis, 9 Ib. 272 (1812); Nichols v. Moody, 22 Barb. 611 (1856); Dawes v. Jackson, 9 Mass. 490 (1813); Hodgson v. Dexter, 1 Cranch 345 (1803);

reason of fraud or of any act on his part preventing payment by the government which he represents.¹

Among the public officers who have been held to be exempted from individual liability may be enumerated cabinet officers,² officers in the army³ and navy, collectors⁴ and other treasury officers, foreign ministers and consuls,⁵ State superintendents of canals,⁶ and of State prisons,⁷ sheriffs,⁸ State and county building committees⁹ and municipal officers.¹⁰

§ 133. **Official Additions to Agent's Signature, "Agent," &c.—Principal not Named.**—The signer of a bill or note is no less liable individually because he adds the word "agent"

Osborne v. Kerr, 12 Wend. 179 (1834); *Fox v. Drake*, 8 Cow. 191 (1828); *Walker v. Swartwout*, 12 Johns. 444 (1815); *Olney v. Wickes*, 18 *Id.* 122 (1820). But this was held to be a question of intention to be ascertained from the terms of the contract in *Perry v. Hyde*, 10 Conn. 330 (1834).

¹*Freeman v. Otis*, 9 Mass. 272 (1812). And in *Savage v. Rix*, 9 N. H. 263 (1838), road commissioners were held personally liable on a joint and several note executed "in official capacity" by reason of their having acted without authority. So, in *Ross v. Brown*, 74 Me. 352 (1883), a town treasurer, describing himself as such in the body of the note and signing it "A. B., treasurer," but having no authority to execute it.

²*Hodgson v. Dexter*, 1 Cranch 345 (1803), draft by the secretary of war. As to the liability of the government on such drafts, see *Floyd Acceptances*, 7 Wall. 666 (1868).

³*Walker v. Swartwout*, 12 Johns. 444; *Quartermaster-General, Syme v. Butler*, 1 Call 105 (1796), Deputy Commissary-General signing a contract for army stores, "Wm. Aylett, D. C. G. P."

⁴*Nichols v. Moody*, 22 Barb. 611 (1856).

⁵*Jones v. Le Tombe*, 3 Dall. 384.

⁶*Osborne v. Kerr*, 12 Wend. 179 (1834); or superintendent of State fair grounds, *Bingham v. Kimball*, 17 Ind. 396 (1861).

⁷*Dawes v. Jackson*, 9 Mass. 490 (1813).

⁸*Enloe v. Hall*, 1 Humph. 303 (1839).

⁹*Fox v. Drake*, 8 Cow. 191 (1828), commissioners appointed by statute for building a court house; or county trustees on a contract for building a bridge, *Tucker v. The Justices*, 13 Ired. 434 (1852); *Damerson v. Irwin*, 8 Ired. 421 (1848). But a town committee for such purpose in the form "said committee agrees," &c., was held to be individually liable in *Simonds v. Heard*, 23 Pick. 120 (1839). *Shaw, C. J.*, saying that the payees' "knowledge that the work was done for the town and was ultimately to be paid for by them was perfectly consistent with the fact that they had the personal obligation of the committee to pay them for it."

¹⁰An overseer of the poor is such public officer, *Olney v. Wickes*, 18 Johns. 122 (1820). So, a municipal committee appointed for a special purpose, *Randall v. Van Vechten*, 19 Johns. 60 (1821); and see §§ 136, 137, *infra*. Selectmen making and signing a promissory note in their official name without authority have been held upon it individually, *Underhill v. Gibson*, 2 N. H. 352 (1821). So, too, "the Intendant and Council of Eutaw" making a contract in such name, concluding "witness their hands and seals, A. B., Int. (seal), C. D. (seal), E. F. (seal)," *Hall v. Cockrell*, 28 Ala. 507 (1856).

to his name.¹ And his individual liability is not affected by his having ceased to be the agent before the maturity of the note, or by the fact of no demand having been made of the principal when disclosed.² But it has been held, in New York, that a person signing a draft simply "A. B., agent," and disclosing his principal to the payee, cannot be held individually;³ and that a principal who has not been named in giving such a note in his business may be held,⁴ and may be shown by parol to be the principal, although not indicated by anything in the note but the signature, "A. B., agent."⁵

In like manner the mere addition of an official title without naming or otherwise indicating, either in the signature or in the body of the instrument, the person or corporation in whose behalf the instrument is given, leaves the maker or drawer in general individually liable. Such words are "President," "Secretary," "Treasurer," "Trustee," "Super-

¹ Daniel 285; 1 Parsons 96; *Bartlett v. Hawley*, 120 Mass. 92 (1876); *Anderton v. Shoup*, 17 Ohio St. 125 (1866); *Collins v. Buckeye State Ins., Ib.* 215 (1867); *Pentz v. Stanton*, 10 Wend. 271 (1833); *Bank v. Cook*, 38 Ohio St. 442 (1882); *Thurston v. Mauro*, 1 Greene 231 (Iowa 1848); *Williams v. Robbins*, 16 Gray 77 (1860); *Manufacturers' Bank v. Follett*, 11 R. I. 92 (1874). But it has been held that a note payable to the order of A. B., may be indorsed "A. B., agent," without individual liability, such indorsement being under special circumstances in that case considered equivalent to a special indorsement without recourse, *Mott v. Hicks*, 1 Cow. 539 (1823). As to principal's liability on a note payable to, and indorsed, by "A. B., agent," see *Merchants' Bank v. Central Bank*, 1 Ga. 418 (1846).

² *Hall v. Bradbury*, 40 Conn. 32 (1873).

³ *Hicks v. Hinde*, 9 Barb. 528 (1850); *Rathbon v. Budlong*, 15 Johns. 1 (1818). And it seems that there is no difference whether such person be a private agent or an agent of the government, *Ib.* It is said, in *Conro v. Port Henry Iron Co.*, 12 Barb. 27 (1851), that the addition of the word "agent" to the signature is of itself notice that the party meant not to be bound personally. The principal was, however, held in that case, because the name used on the bill was held to be one which the principal had adopted and used for his business as his own.

⁴ *Moore v. McClure*, 8 Hun 558 (1876); *Green v. Skeel*, 2 Hun 485, *Mullin, P. J.*, refusing in this case to follow *De Witt v. Walton*, 9 N. Y. 571, "if it is to be understood as deciding that the principal is not bound in any case by a writing signed by the agent in his own name, with the word 'agent' added." And the principal may be disclosed and held on such note by parol evidence, *Moore v. McClure*, *supra*. In *Indiana* the principal is liable on such note in equity but not at law, *Kenyon v. Williams*, 19 Ind. 44 (1862).

⁵ *Rathbon v. Budlong*, 15 Johns. 1 (1818); *Hicks v. Hinde*, 9 Barb. 528 (1850); *Green v. Skeel*, 2 Hun 485; *Pease v. Pease*, 35 Conn. 131 (1868); or to show a corporation intended by the simple signature "A. B., president," *Devendorf v. W. Va. Oil Co.*, 17 W. Va. 138 (1880). But see *contra*, in *Ohio*, *Collins v. Buckeye State Ins.*, 17 Ohio St. 215 (1867).

visors.”¹ And it has been held that the cutting off of the words “President” and “Secretary” is not a material alteration, where the execution of the instrument is not denied in the plea.² But where a note was made payable to “R. B., Treasurer,” and indorsed in like manner to one who received it for a debt of the corporation of which R. B. was treasurer, knowing him to be acting as such officer, R. B. was held not to be liable individually on his indorsement.³

An exception to the above rule as to the addition of an official title is made in favor of the ordinary usage by banks of the word “cashier” and its abbreviations. It is customary to make negotiable paper intended for banks payable to its cashier as cashier, with or without the corporate name of the bank superadded. Paper made payable in this way belongs to the bank and may be sued by it.⁴ And an indorsement

¹*Chemung Canal Bank v. Supervisors*, 5 Denio 517 (1848); *Pease v. Pease*, 35 Conn. 131 (1868); *Bank v. Cook*, 38 Ohio St. 442 (1882); *Thackeray v. Hanson*, 1 Col. 365 (1871); *Trustees of Cahokia v. Rautenberg*, 88 Ill. 219 (1878). In this case the note was signed A. B., “school trustees,” but their office had expired before it was made. To like effect, see *Witte v. Derby*, 2 Conn. 260 (1817), the bill being only signed “C. G., President,” by a usage of the corporation, although the statute only made such bills binding on the corporation as were signed by the president and secretary. And even a note made as follows, “I, A. B., as trustee of the La. Company, promise, &c. * * * A. B., trustee, La. Co.,” binds only the individual maker, *Rupert v. Madden*, 1 Chandler 146 (1849). So, a note for A. B.’s individual debt, signed “A. B., trustee of C. D.,” *Conn v. Scruggs*, 5 Baxt. 567 (1873). So, a covenant by A. B., “as trustee,” binds A. B. individually, *Duvall v. Craig*, 2 Wheat. 56 (1817); or a covenant in a bill of sale, “we, A. and B., trustees of C., promise,” &c., *Jordan v. Trice*, 6 Yerg. 479 (1835). But a note running “we, as trustees, but not individually, promise,” &c., signed A. B., “trustees,” and secured by a trust deed, does not bind the makers individually, *Shoe, &c., Nat. Bank v. Dix*, 123 Mass. 148 (1877). So, too, a note signed “A. B., by her trustee C. D.,” binds the trust estate, *Taylor v. Shelton*, 30 Conn. 122 (1861). So, a note given for the purchase of trust property, and signed “A. B., trustee for C. D.,” *Lewis v. Harris*, 4 Mete. 353 (Ky. 1863). But a note indorsed “A. B., receiver,” binds only A. B. individually, *Towne v. Rice*, 122 Mass. 67 (1877).

²*Thackeray v. Hanson*, 1 Col. 365 (1871).

³*Babcock v. Beman*, 11 N. Y. 200 (1854), affirming 1 E. D. Smith 593; *Passmore v. Mott*, 3 Binn. 201 (1807). See, too, *Tradesman’s Bank v. Astor*, 11 Wend. 87 (1833), where an association was held upon a check by its treasurer, drawn as treasurer of the association and overdrawing its account. So, too, where a note or bill is given for a corporation debt, the corporation has been held liable on the signature “A. B., president,” *Sharpe v. Bellis*, 61 Penna. St. 69 (1869); or “A. B., treasurer,” *Carpenter v. Farnsworth*, 106 Mass. 561 (1871); or “A. B. C., rector and wardens,” *Episcopal Char. Soc. v. Episc. Ch.*, 1 Pick. 372 (1823).

⁴*First Nat. Bank v. Hall*, 44 N. Y. 395 (1871); *Watervliet Bank v. White*, 1 Denio 613 (1845); *Folger v. Chase*, 18 Pick. 63. See also, *Hartford Bank*

by the cashier as "A. B. cashier" renders the bank and not the individual liable as indorser.¹ And this is the usual and proper form of an indorsement or acceptance for a bank.²

§ 134. **Signature as "Executor"—"Administrator"—"Guardian."**—Where an executor or administrator gives a note or bill and signs it "A. B., executor," or "A. B., administrator," he is individually liable on the paper.³ And the estate which he represents is not liable on the instrument, even though it be given for a debt of the estate or in other way for the estate's benefit.⁴ By such signature the indi-

v. Barry, 17 Mass. 94. So, of an agreement signed "E. L., cashier of the F. & M. Bank," an effort being made to hold him personally in an action after he had left his position in the bank, *Barbour v. Litchfield*, 4 Abb. App. Dec. 655 (1859).

¹ *Daniel* 389; *Bank of Genesee v. Patchin Bank*, 13 N. Y. 309 (1855); *S. C.*, 19 *Ib.* 312 (1859); *Bank of the State v. Wheeler*, 21 Ind. 90 (1863); *Collins v. Johnson*, 16 Ga. 458 (1854); *Houghton v. First Nat. Bank*, 26 Wis. 663 (1870). And this is true even where the bill so indorsed was made payable to the order of "A. B., cashier," *Bank of State of N. Y. v. Muskingum Branch*, 29 N. Y. 619 (1864), affirming 36 Barb. 332. See, however, *contra*, *Bank of State of N. Y. v. Farmers' Bank*, 36 Barb. 332 (1862).

² *Fleckner v. U. S. Bank*, 8 Wheat. 338, 355 (1823); *Folger v. Chase*, 18 Pick. 63 (1836); *Farmers' and Mechanics' Bank v. Troy City Bank*, 1 Dougl. 457 (Mich. 1844); *Burnham v. Webster*, 19 Me. 232 (1841); *Corser v. Paul*, 41 N. H. 24 (1860); *State Bank v. Fox*, 3 Blatch. C. C. 433 (1856); *Houghton v. First Nat. Bank*, 26 Wis. 663 (1870); *Potter v. Merchants' Bank*, 28 N. Y. 641 (1864); *Bank of State of N. Y. v. Farmers' Branch*, 36 Barb. 332, affirmed 29 N. Y. 619 (1864), *supra*.

³ *Bytes* 58; *Chitty* 231; 1 *Daniel* 253; 1 *Parsons* 161; *Story on Prom. Notes* § 63; *Peter v. Beverly*, 10 Pet. 532 (1836); *Tryon v. Oxley*, 3 Iowa 289 (1851); *Child v. Monins*, 2 Brod. & B. 460; 5 *Moore* 281; *Ridout v. Bristow*, 1 Tyrw. 90; *S. C.*, 1 C. & J. 231; *Serle v. Waterworth*, 6 Dowl. 684; *S. C.*, 4 M. & W. 9; *King v. Thorn*, 1 T. R. 489; *Nelson v. Serle*, 4 M. & W. 795; *Liverpool Borough Bank v. Walker*, 4 DeG. & J. 24; *Gibson v. Minet*, 1 H. Bl. 622; *Tassey v. Church*, 4 Watts & S. 346 (1842); *Gregory v. Leigh*, 33 Tex. 813 (1871); *McGrath v. Barnes*, 13 So. Car. 328 (1879); *Greening v. Sheffield*, 1 Ala. 274 (1824); *Hostetter v. Hoke*, 17 Kans. 81 (1876); *Harrison v. McClelland*, 57 Ga. 531 (1876); *Corinthwaite v. First Nat. Bank*, 57 Ind. 268 (1877); *Plimpton v. Goodell*, 126 Mass. 119 (1879); *Kessler v. Hall*, 64 N. C. 60 (1870); *Yerger v. Foote*, 48 Miss. 62 (1873); *Christian v. Morris*, 50 Ala. 585 (1874); *Livingston v. Gaussen*, 21 La. An. 286. And it is plain that a decedent's estate cannot be bound by the signature of his executor on a note without any words indicating that he is such executor, *Martin v. Fitch*, 65 Ind. 216 (1878). So, an acceptance by an executor or administrator makes him individually liable, *Chitty* 346; *King v. Thorn*, *supra*; *Ridout v. Bristow*, *supra*; *Aspinall v. Wake*, 10 Bing. 51; *S. C.*, 3 Moo. & S. 423. And this is true even in the case of a draft by a distributee of the testator's estate on the executor as such, accepted in like manner, *Wisdom v. Becker*, 52 Ill. 342 (1869); *Mills v. Kuykendall*, 2 Blackf. 47 (1827).

⁴ But he may look to the estate for re-imbursement, *Peter v. Beverly*, 10 Pet. 532 (1836). And in Louisiana the executor may exonerate himself from individual liability and charge the estate, *Livingston v. Gaussen*, 21 La. An. 286.

vidual becomes liable, although the estate which he represents be named, *e. g.* "A. B., executor of the estate of C. D.;"¹ and although he promises "as executor," &c., to pay.² But a different rule prevails in Maine, where judgment must be rendered *de bonis testatoris* on such note.³

An executor or administrator may exonerate himself from personal liability by confining his promise to a payment "out of the estate of A. B.," &c., by words to that effect.⁴ It is also to be remembered that a valid consideration is no less necessary in promises by an executor or administrator than in other cases. The debt of the deceased is not of itself a sufficient consideration to make the executor or administrator liable beyond such assets of the estate as may remain in his hands.⁵ In general a bill or note by a personal representative of the deceased debtor requires some such consideration as assets in hand or forbearance on the creditor's part to make it binding upon the individual maker.⁶ Such bill or note is, however, *prima facie* evidence of assets in the maker's hands.⁷

¹Liverpool Bank *v.* Walker, 4 DeG. & J. 24 (1859); Curtis *v.* Bank of Somerset, 7 Har. & J. 25 (1826); Lovelace *v.* Smith, 39 Ga. 130; McFarlin *v.* Stinson, 56 *Ib.* 396 (1876); East Tenn. Iron Mfg. Co. *v.* Gaskell, 2 B. J. Lea 742 (1879). But not so where the administratrix is an infant executing the note as her husband's personal representative, Pool *v.* Hines, 52 Ga. 500 (1874); Kirkman *v.* Benham, 28 Ala. 501 (1856); Rittenhouse *v.* Ammerman, 64 Mo. 197 (1876); Snead *v.* Coleman, 7 Gratt. 305 (1851); Erwin *v.* Carroll, 1 Yerg. 145 (1829); Bradley *v.* Heath, 3 Sim. 543 (1830). But it has been held that where such an acceptance has been given for a debt properly due from the estate, the estate may be held in an action against the maker *as administrator*, Steele *v.* McDowell, 9 Sim. & M. 193 (1843).

²Child *v.* Monins, 2 Brod. & B. 460; Ashby *v.* Ashby, 7 B. & C. 446; 1 M. & Ry. 80; Studebaker Mfg. Co. *v.* Montgomery, 74 Mo. 101 (1881). So, in East Tenn. Iron Mfg. Co. *v.* Gaskell, *supra*, where the note was signed "A. B. C., executors," and read "we, the executors of C. D., promise as such executors," &c.

³Davis *v.* French, 20 Me. 21 (1841). But signing in a representative capacity will not protect him from individual liability, if his promise be founded on a sufficient consideration, Walker *v.* Patterson, 36 Me. 273 (1853).

⁴Byles 58; 1 Daniel 255; 1 Parsons 161; Story on Prom. Notes § 63; Studebaker Mfg. Co. *v.* Montgomery, *supra*.

⁵Byrd *v.* Holloway, 6 Sm. & M. 199 (1846); Rucker *v.* Wadlington, 5 J. J. Marsh. 238 (1830).

⁶Rittenhouse *v.* Ammerman, 64 Mo. 197 (1876).

⁷Snead *v.* Coleman, 7 Gratt. 305 (1851).

In like manner a guardian signing a bill or note as such is individually liable on it;¹ even though he "promise as guardian."² And such liability is not affected by the fact that the so-called guardian has received his discharge as guardian and cannot re-imburse himself out of his ward's estate.³

So, the addition of the word "surety" to a maker's signature is unavailing, and he will be held individually notwithstanding such addition.⁴ Such addition has been held to be wholly immaterial,⁵ but in another case it is said to be a material alteration.⁶ On the other hand, a note made to and indorsed by "A. B., assignee," has been held not to make A. B. individually liable.⁷

§ 135. **Corporation and Official Signatures—In Principal's Name.**—Where a commercial instrument is made expressly in the name of a corporation or other principal, the intention to bind the principal is manifest, and the paper drawn or signed in this way will be taken to be his contract and not that of the agent. To avoid personal liability the corporation officer or other agent signing a bill, note or check, should make the promise expressly in his principal's name,

¹Robertson v. Banks, 1 Sm. & M. 666 (1844); Poole v. Wilkinson, 42 Ga. 539 (1871); Coons v. Kendall, 27 La. An. 443 (1875); Carter v. Wolfe, 1 Heisk. 694 (1870). So, as to covenants in a deed, Whiting v. Dewey, 15 Pick. 428 (1834). But the rule is different in Louisiana, and the ward's estate may be charged by a note made in conformity with an order of the probate court and signed by "A. B., tutor," Coons v. Kendall, 27 La. An. 443 (1875); or even by drafts drawn by "A. B., tutor," to his own order for supplies of his ward's plantation and indorsed simply "A. B.," Lapeyre v. Weeks, 28 La. An. 664 (1876).

²Forster v. Fuller, 6 Mass. 58 (1809), the words relating to the guardianship being only inserted as was held, "to entitle himself to indemnity from his ward."

³Thacher v. Dinsmore, 5 Mass. 299 (1809).

⁴Inkster v. First Nat. Bank, 30 Mich. 143 (1874). "The case of Pain v. Packard, 13 Johns. 174 (which has been followed in New York not without some vigorous protests, and to some extent in some other States) was, we think, a clear departure from the common law, and we find nothing in the English decisions to warrant the qualifications of surety's liabilities there recognized," Christiancy, J., *Ib.* p. 148. So, too, Rice v. Cook, 71 Me. 559 (1880); Hughes v. Littlefield, 18 *Ib.* 400.

⁵Kleckner v. Klapp, 2 Watts & S. 44 (1841).

⁶Lamb v. Price, 46 Iowa 550 (1877).

⁷Bowne v. Douglass, 38 Barb. 312.

either by the words of promise in the body of the instrument or by the signature. As in other parts of a bill or note, no particular form is requisite, but all uncertainty must be carefully avoided.

A promise in the name of the principal, although not signed by his name, is the contract of the principal and not of the agent. Thus, a promissory note reading, "The Patent Cloth Manufacturing Company promise," &c., and signed "W. S., agent," is the note of the corporation.¹ So, a note running thus: "The Newport Manufacturing Company promises," &c., and signed "J. W. T., treasurer;"² or, "The Ocean Mining Company promises," and signed "A. B., trustee."³ So, too, a contract in the words, "We, the Appleton Fire Insurance Co., by A. B., President, are held," &c., signed "A. B., President," with a common seal affixed to the signature, was held to be obligatory only on the corporation.⁴ In like manner, the note of a voluntary association, "The M. M. Co. promises," &c., signed "A. B., C. D., Directors," is binding upon all the members of the association.⁵ So, the

¹Shotwell v. McKown, 2 South. 828 (1820). See, too, Jefis v. York, 4 Cush. 371 (1849); S. C., 10 *Ib.* 392 (1852), where the note ran thus: "The pastor and deacons of the First Baptist Church, in behalf of said church, promise, &c. * * * S. D. G., agent for the First Bapt. Ch." So, a sealed contract in the company's name, signed "A. B., agent for the Del. & H. Canal Co.," is a corporate contract, Dubois v. Del. & H. C. Co., 4 Wend. 285 (1830). But a sealed contract of sale by T., "by B. his attorney," signed by B., "as attorney of T.," was held not to be T.'s contract in Townsend v. Hubbard, 4 Hill 351 (1842).

²Commercial Bank v. Newport Mfg. Co., 1 B. Mon. 13 (1840); Moor v. Wilson, 26 N. H. 332 (1853). See, too, Hall v. Auburn Turnpike Co., 27 Cal. 255 (1865); Hall v. Crandall, 29 *Ib.* 567 (1866). And such a contract is binding upon the corporation and not the individual, although a common seal is added to the signature, "A. B., President," Hopkins v. Mehafty, 11 Serg. & R 126 (1824). This is also the character and proper construction of a note, in form, "We, the inhabitants of School District No. 12, promise," &c., signed "A. B., treasurer," Whitney v. Stow, 111 Mass. 368 (1873). So, a note, "We, the H. C. Agric. Association, by her directors, do promise, &c., A. B., Secretary, C. D., E. F., Directors of the H. C., &c., Assoc.," Armstrong v. Kirkpatrick, 79 Ind. 527 (1881).

³Shaver v. Ocean Mining Co., 21 Cal. 46 (1862). So, a township certificate "that there is due from the township * * * for school furniture," signed "H. B., trustee of Johnson township," binds the township, Johnson School Township v. Citizens' Bank, 81 Ind. 515 (1882).

⁴Ellis v. Pulsifer, 4 Allen 165 (1862).

⁵McGreary v. Chandler, 58 Me. 537 (1870).

note of a partnership using a corporation name and signed "A. B., Treasurer."¹

A promise signed in the principal's name, is also his contract and not that of the agent, although the principal be not indicated in the body of the instrument.² This is true of an indorsement in the words, "Marine Bank, by J. S. H., President."³ So, a note signed "Steamboat Ben Lee and owners, by W. R., Capt.," is binding upon the owners.⁴ So, a note signed "For the Providence Hat Manufacturing Company, F. R.;"⁵ or "For the M. Iron Works, A. B., President, C. D., Secretary."⁶ So, a note beginning "We promise," &c., and signed "A. & Co., A. B., President."⁷ So, the acceptance of a draft drawn by the Empire Mills on E. C. H. in the words "Accepted, Empire Mills, by E. C. H., treasurer," is the company's acceptance and not that of the individual.⁸ So, a note beginning, "We promise," &c., and concluding, "Witness our hands and seals, A. B., for C. D. & Co.," is the note of C. D. & Co.⁹ And the corporate character is still more plain in a note reading, "We, the President and Directors of the C. S. M. Co. promise," &c., signed, "A. B., President," and sealed with the corporation seal.¹⁰

¹ Walker v. Wait, 50 Vt. 668 (1878).

² Ruffin v. Mebane, 6 Fred. Eq. 507 (1850). And although the agent be not authorized to give the note in question, the principal will be liable for goods purchased for him and by his authority, for which the note was given, *Ib.* So, too, Emerson v. Providence Mfg. Co., 12 Mass. 237 (1815).

³ Aiken v. Marine Bank, 16 Wis. 713 (1863).

⁴ Sanders v. Anderson, 21 Mo. 402 (1855). So, too, an acceptance by "A. B., Capt.," of a bill drawn on "The owners of the Steamboat Messenger," May v. Hewitt, 33 Ala. 161 (1858).

⁵ Emerson v. Providence Mfg. Co., 12 Mass. 237 (1815).

⁶ Roney v. Winter, 37 Ala. 277 (1861).

⁷ Atkins v. Brown, 59 Me. 90 (1871); Castle v. Belfast Foundry Co., 72 Me. 167 (1881), 15 Am. L. Rev. 358; Draper v. Mass. Steam Heating Co., 5 Allen 338 (1862). So, a note reading, "We, the trustees of the F. W. Bapt. Soc., promise," &c., and signed with the corporate name and the individual names of the trustees, is properly executed as the note of the corporation, Gillet v. New Market Sav. Bank, 7 Bradw. 499 (1880).

⁸ Walker v. Bank of the State of New York, 9 N. Y. 582 (1854).

⁹ Cook v. Sanford, 3 Dana 237 (1835).

¹⁰ Pitman v. Kintner, 5 Blackf. 250 (1839). As to the effect of a corporate seal in defining the character of such a paper, see § 138, *infra*.

The fact that a bill or note is given in a form proper to bind the principal and not the agent who executes it, cannot, of course, preclude the principal from any defense that he may have by reason of the *want of authority in the agent* or the absence of any consideration to himself.¹ If, however, the instrument is plainly executed as the contract of the principal and not of the agent, and it appears that the agent had no authority to execute it, it often becomes a question of importance whether the *unauthorized agent* has made himself liable *as maker, drawer, acceptor or indorser* of the paper in controversy. That the agent in such case is liable for false warranty, deceit or in other form is admitted.² And the rule seems to be established by the American cases, that as to contracts other than negotiable instruments an agent, acting in the principal's name without his authority, makes himself individually liable *on the contract*.³ Whether this rule is applicable to commercial paper is a question upon which authorities are divided.⁴ It has been held that an agent accepting a bill without authority in his principal's name renders himself liable for the tort but not on the bill as an acceptor.⁵ And this seems to be the rule generally followed by the English cases and by the better and more

¹Hall v. Auburn Turnpike Co., 27 Cal. 255 (1865).

²West London Com. Bank v. Kitson, L. R. 13 Q. B. D. 360 (1884); McHenry v. Duffield, 7 Blackf. 41 (1843). And a bank president, who has made himself liable personally by an indorsement for the bank in excess of the amount of debt authorized by its charter, will not be discharged from the tort by the release of an accommodation acceptor, who was liable on the bill, Brannin v. Loring, 20 Cent. L. J. 57 (Ky. S. C. 1884).

³Meech v. Smith, 7 Wend. 315 (1831); Bay v. Cook, 2 Zab. 343 (1850); Feeter v. Heath, 11 Wend. 479 (1833). So, too, upon a covenant under seal, White v. Skinner, 13 Johns. 307 (1816). But see, *contra*, as to simple contracts, Jenkins v. Hutchinson, 13 Q. B. 744 (1849); Lewis v. Nicholson, 18 Ib. 503 (1852); Woodes v. Dennett, 9 N. H. 55 (1837); and *infra* as to sealed contracts.

⁴Story on Prom. Notes § 71.

⁵Byles 39; Chitty 47; 1 Daniel 286; Polhill v. Walter, 2 B. & Ad. 114. But if he had signed the drawer's name without authority, *quære*, whether he would not have been personally liable on the bill as drawer, Wilson v. Barthrop, 2 M. & W. 863. "At all events, in order to make him so liable, it is incumbent on the plaintiff to prove the want of authority and that the defendant did not act *bona fide*," Chitty 48.

recent American authorities.¹ There are, however, authorities of some weight to the contrary.²

§ 136. **Principal Named only in Agent's Official Title—In Instrument.**—Merely naming the principal, either in the body of the instrument or in the signature, does not of itself make the contract even apparently that of the principal. This occurs most frequently in bills of exchange and other papers executed by corporation officers using their full official title, which includes the name of their principal, the corporation. In general such titles, however fully the prin-

¹ Daniel 286; *Bartlett v. Tucker*, 104 Mass. 336 (1870); *Ballou v. Talbot*, 16 Mass. 461 (1820); *Jefts v. York*, 4 Cush. 391 (1849); S. C., 10 *Id.* 392 (1852); *Hancock v. Yunker*, 83 Ill. 208 (1876); *Lander v. Castro*, 43 Cal. 497 (1872); *Hall v. Crandall*, 29 Cal. 567 (1866); *McHenry v. Duffield*, 7 Blackf. 41 (1843); *Harkins v. Edwards*, 1 Iowa 426 (1855); *Sheffield v. Ladue*, 16 Minn. 388 (1871); *Delius v. Cawthorn*, 2 Dev. 90 (1829); *Moor v. Wilson*, 26 N. H. 332 (1853). So, too, an agent signing a sealed instrument in the name of his principal without authority, is not liable on it, *Abbey v. Chase*, 6 Cush. 54 (1850); *Hopkins v. Mehaffy*, 11 Serg. & R. 128 (1824); *Gibson, J.*, disapproving in this respect *Chitty Pl. 24* and *Tippets v. Walker*, 4 Mass. 595. In this latter case, however, the agents had "expressly bound themselves." Neither will an agent, whose authority has expired by the death of his principal, be bound personally by a deed executed in his principal's name, *Harper v. Little*, 2 Me. 14 (1822); *Stetson v. Patten*, *Id.* 358. See, further, as to the liability of an agent contracting without authority in his principal's name, the remarks of *Ellsworth, J.*, in *Ogden v. Raymond*, 22 Conn. 385 (1853).

² *Parsons* 105; *Dusenbury v. Ellis*, 3 Johns. Cas. 70 (1802); *Grafton Bank v. Flanders*, 4 N. H. 239 (1827); *Rossiter v. Rossiter*, 8 Wend. 494 (1832); *Weare v. Gove*, 44 N. H. 196 (1862); *Roberts v. Button*, 14 Vt. 195 (1842). This was also held in the case of a note running "we promise," &c., and signed "G. Stephens," and under that the initials "W. G. S." Here it was claimed that "W. G. S." signed merely as agent for G. S. & Co., of which firm he was not a member, but was the authorized agent. But the note being signed with the individual name of G. S., for whom he was not authorized to act, W. G. S. was held personally liable, *Palmer v. Stephens*, 1 Denio 472 (1845). So, an unauthorized agent who signed with his individual name a note reading "The steamer *Tecumseh* and owners promise," &c., *Ormsby v. Kendall*, 2 Ark. 338 (1840). So one, who made a note without authority in the simple form, "I promise," &c., and signed it, "A. B., attorney for C. D.," was held on it personally in *Byars v. Doores*, 20 Mo. 284 (1855). So, where a note read "We, the Selectmen of R., promise," &c., and was signed, "A. B., Selectmen," *Underhill v. Gibson*, 2 N. H. 352 (1821). And so, too, of a joint and several note signed by Road Commissioners in their "official capacity," *Savage v. Rix*, 9 N. H. 263 (1838). So, too, an agent, without authority to execute a note for a firm, but signing it and holding himself out as a member of the firm, is liable on it, *Dodd v. Bishop*, 30 La. An. 1178 (1878). And it is said that an agent, executing a note without authority, is liable on an implied warranty of authority, *White v. Madison*, 26 N. Y. 124 (1862). And if liable on the contract, it seems that he is so only where he "had no authority *in fact* to use the name of his principal," *Selden, J.*, in *Walker v. Bank of State of New York*, 9 N. Y. 585 (1854).

principal be named in them, are to be considered as a mere *descriptio personæ*, and the agent executing the paper remains individually liable upon it, and the corporation is not bound.

Thus, first, *in the instrument*: a promissory note, in form, "We, the Trustees of the Methodist Episcopal Church of A., promise," &c., binds the individual signers only.¹ So, too, a note, in form, "I, J. F., President of the Mechanics' Insurance Company, promise," &c.;² or, "We, the trustees of the Methodist Episcopal Society for building a parsonage house, promise," &c., although in this case a corporate consideration and purpose appeared to be plainly designated.³ Likewise, on a note, in form, "We, the Trustees of the Methodist Episcopal Church, promise," &c., signed "A., B., C., trustees of the Meth. Episc. Ch.," the persons signing were held to be individually and alone liable;⁴ and so, *a fortiori*, on a note, in form, "We, the Trustees of the Presbyterian Church, promise," &c., signed merely "A., B., C., trustees."⁵ In the other cases above mentioned the signature consisted simply of the name with no official title added.⁶

¹Packard v. Nye, 2 Metc. 47 (1840); Hypes v. Griffin, 89 Ill. 134 (1878); Fogg v. Virgin, 19 Me. 352 (1841). And this is true, a *portion* of a joint and several bond, in like form signed with the individual names, with common seals, and no official addition to their signatures, Drayton v. Warne, 14 Vroom 659 (1881). But a note, "We, the subscribers for the Carmel Cheese Manufacturing Co., promise," &c., signed with the individual names of the directors and given for a corporation purpose by its authority, was held to be the note of the corporation in Simpson v. Garland, 72 Me. 40 (1881), 24 Alb. L. J. 353.

²Barker v. Mechanics' Ins. Co., 3 Wend. 94 (1829).

³Chick v. Trevett, 20 Me. 462 (1841).

⁴Mears v. Graham, 8 Blackf. 144 (1846). But see, *contra*, New Market Sav. Bank v. Gillet, 100 Ill. 254 (1881).

⁵Powers v. Briggs, 79 Ill. 493 (1875). This particular decision, although correctly following the cases last cited, appears to have turned on, or at least emphasized, the fact that the note did not appear to be the act of the corporation. A similar case is that of a lease made by "A. B., treasurer of the Eagle Lodge," and signed "A. B., treasurer." In that case, A. B. was held to be personally liable, Seaver v. Colburn, 10 Cush. 324 (1852). So, too, on a sealed covenant signed by a committee of turnpike company directors appointed for building the road and so describing themselves, Tippets v. Walker, 4 Mass. 595 (1808).

⁶Barker v. Mechanics' Ins. Co., 3 Wend. 94 (1829); Packard v. Nye, 2 Metc. 47 (1840); Fogg v. Virgin, 19 Me. 352 (1841); Chick v. Trevett, 20 Me. 462 (1841); Hypes v. Griffin, 89 Ill. 134 (1878).

The individual signers were held personally in like manner on a note, in form, "We, or either of us, Directors of the T. Company, promise," &c., signed "A. B., President, C. D., E. F.," the form of the promise seeming to indicate this construction.¹ And a similar construction has been given to a note, in form, "We, the Directors of the A. B. Company, promise," &c., signed "C., D., E.," and sealed with the corporation seal.² The same construction was followed in a note, in form, "We, the Selectmen of R., promise," &c., signed "A., B., Selectmen," although the conclusion in this case seems to have been derived from the fact that the public officers signing the note acted without sufficient authority in so doing.³ In the case of a note similar to the foregoing, in form, "We, the Trustees of School District No. 100, promise," &c., signed "A., B., Trustees," it has been held that the individual signers were *prima facie* liable, but might discharge themselves by proving that they acted merely as agents.⁴ As to the general effect of parol evidence in such cases the reader is referred to a subsequent part of this chapter.

On the other hand, it was held in an early case, which cannot now be considered of any authority, that a note, in form, "I, A. B., treasurer of the D. T. Company, promise," &c., signed "A. B., treasurer of the D. T. Co.," bound the company and not the agent who signed it.⁵ And an exception to the rule laid down above seems to have been made in

¹ *Whitney v. Sudduth*, 4 Metc. 296 (Ky. 1863).

² *Dutton v. Marsh*, L. R. 6 Q. B. 361 (1871).

³ *Underhill v. Gibson*, 2 N. H. 352 (1821).

⁴ *Bingham v. Stewart*, 13 Minn. 106 (1868).

⁵ *Mann v. Chandler*, 9 Mass. 335 (1812). Speaking of this case Judge Gray said in *Barlow v. Cong. Society*, 8 Allen 461: "That case, although it has never been in terms overruled, has never been followed in this commonwealth, can hardly be reconciled with the later decisions, and must be maintained, if at all, upon the ground that the treasurer of a corporation is, by virtue of his office, the hand by which the corporation conducts all its pecuniary affairs, signs all its commercial paper and pays all its debts. * * * All the decisions of this court upon unsealed instruments since the case of *Mann v. Chandler* have required something more than a mere description of the general relation between the agent and the principal in order to make them the contracts of the latter."

favor of the term "president and directors," as being at least a *quasi*-corporate name. Thus, a note, in form, "The President and Directors of the A. B. Company, promise," &c., has been held to be a corporation note.¹ Other cases have held that in a note of this form signed "A., president, B., C., directors," parol evidence is admissible to show a corporation note intended.² So, too, a note, in form, "We, the inhabitants of School District No. 12, promise," &c., signed "A. B., treasurer," is the note of the School District and not of A. B.³ So, too, the following notes of school or other municipal officers: "We, the undersigned directors of School District No. 4, promise," &c., signed with their names simply;⁴ "We, the undersigned committee for the First School District, promise," &c., signed "A., B., C., committee;"⁵ "I, A. B., director of District No. 2, promise," &c., signed "A. B., director."⁶ So, too, a contract under seal by "A., B., C., a committee appointed by the corporation of Albany for the purpose," is a contract of the municipal corporation and not of the individual members of the committee.⁷ So, a promissory note in the name of "The Pastor and Deacons of the First Baptist Church in behalf of said church," signed, "S. D. G., agent for the First Bapt. Ch.," binds the church and not the agent personally.⁸

§ 137. **Principal Named only in Agent's Official Title—In Signature.**—Secondly, *in the signature* the principal's name may occur as a mere *descriptio personæ* completing the official

¹ Daniel 376; 1 Parsons 169; Story on Prom. Notes § 69; Mott v. Hicks, 1 Cow. 513 (1823). Especially so if executed under the corporate seal, Pitman v. Kintner, 5 Blackf. 250 (1839).

² Yowell v. Dodd, 3 Bush 581 (1868); Haile v. Pierce, 32 Md. 327 (1869).

³ Whitney v. Stow, 111 Mass. 368 (1873). This note may be properly regarded as one given in the principal's name.

⁴ Baker v. Chambles, 4 Greene 428 (Iowa 1854). See, too, Sanborn v. Neal, 4 Minn. 126 (1860), where the note read, "We, *as* trustees of School District No. 10, promise," &c. And as to the effect of the word "*as*" and others like it, see *infra*.

⁵ Andrews v. Estes, 11 Me. 267 (1834).

⁶ McGee v. Larramore, 50 Mo. 425 (1872).

⁷ Randall v. Van Vechten, 19 Johns. 60 (1821).

⁸ Jefts v. York, 4 Cush. 391 (1849); S. C., 10 *Ib.* 392 (1852).

title of the agent who signs the instrument. In such cases the note or bill is that of the agent only, although authorities are somewhat at variance in the matter.¹ In like manner a bill of exchange drawn on The Piscataqua F. & M. Ins. Co. signed "D. F. & Co., agts. Piscataqua F. & M. Ins. Co.," binds the individuals only.² So, too, a promissory note signed "A. B., trustees of the Baptist Society;"³ or a bond signed "A. B., trustees of the First Universalist Church,"⁴ is the note or bond of the individuals only. Of the same force is a note signed in that manner and also naming the principal in the body of the instrument in such words as "We, the trustees of the Methodist Episcopal Church promise," &c.⁵ And in England the same construction has

¹"The addition of official character to the signature at the foot of the note will not of itself be sufficient to indicate an intention to bind the corporation, but will be regarded merely as an ear-mark or *descriptio personæ*," 1 Daniel Negot. Inst. 329. See also, for criticism of Prof. Parsons' view, p. 331. This is the rule whether the officer sign his name as *President*, *Burbank v. Posey's Admr.*, 7 Bush 372 (1870); *Chamberlain v. Pacific Wool, &c., Co.*, 54 Cal. 103 (1880); *Moss v. Livingston*, 4 N. Y. 208 (1850); *Scott v. Baker*, 3 W. Va. 285 (1869); *Barker v. Mechanics' F. I. Co.*, 3 Wend. 94 (1829); *Treasurer, Bruce v. Lord*, 1 Hilt. 247 (1856); *Sheridan v. Carpenter*, 61 Me. 83 (1872); *Sturdivant v. Hull*, 59 *Ib.* 172 (1871); *Sumwalt v. Ridgely*, 20 Md. 107 (1863); *Smith v. Alexander*, 31 Mo. 193 (1860); *Mellen v. Moore*, 68 Me. 390 (1878); *Secretary, Drake v. Flewellen*, 33 Ala. 106 (1858); *Agent, Haight v. Naylor*, 5 Daly 219 (1874); *Trustee, Williams v. Second Nat. Bank*, 83 Ind. 237 (1882); *McClellan v. Robe*, 93 Ind. 298 (1883); *contra, School Town of Monticello v. Kendall*, 72 *Ib.* 91; or by some other title. In all the Indiana cases above cited the consideration went to the corporation.

²*Tucker Mfg. Co. v. Fairbanks*, 98 Mass. 101 (1867), *Gray, J.*, saying, p. 104: "In order to exempt an agent from liability upon an instrument executed by him within the scope of his agency, he must not only name his principal, but he must express by some form of words that the writing is the act of the principal, though done by the hand of the agent. If he expresses this, the principal is bound and the agent is not. But a mere description of the general relation or office which the person signing the paper holds, to another person or to a corporation, without indicating that the particular signature is made in the execution of the office and agency, is not sufficient to charge the principal or to exempt the agent from personal liability."

³*Brockway v. Allen*, 17 Wend. 40 (1837), although really made for the benefit of the society, the holder having, however, no notice of that fact, *Hays v. Crutcher*, 54 Ind. 260 (1876); *Fiske v. Eldridge*, 12 Gray 474 (1859); *Fowler v. Atkinson*, 6 Minn. 578 (1861); *Conner v. Clark*, 12 Cal. 168 (1859); *Hayes v. Matthews*, 63 Ind. 412 (1878); *Hayes v. Brubaker*, 65 *Ib.* 27 (1878), although actually made for the church and without consideration of any sort to the trustees.

⁴*Taft v. Brewster*, 9 Johns. 334 (1812); *Hills v. Bannister*, 8 Cow. 1 (1827).

⁵*Mears v. Graham*, 8 Blackf. 144 (1846). So, too, a bond by one named in the body of the instrument and the signature as "trustee of Columbia township," *Hobbs v. Cowden*, 20 Ind. 310 (1863). But see, *contra*, the case of a note signed by a *treasurer* in *Mann v. Chandler*, 9 Mass. 335 (1812), and remarks upon it in note to § 136 *supra*.

been applied to a churchwardens' note, made for the parish and by authority of a vote of the vestry, and signed "A., B., C., churchwardens for the Parish of Chingford, D., Overseer."¹ So, too, a note signed, "A., B., C., Directors of the D. E. Company, limited;"² or a steamboat contract signed, "T. & B., agents of Steamer Flora."³

The contrary doctrine is laid down by Judge Parsons in his learned work on notes and bills, but seems to be less strongly supported by authority.⁴ In some States where the rule has been laid down in this way, the later cases, already cited, have gone over to the majority. The following cases have held that the addition to the signature of the agent's name of an official title disclosing the name of the principal rendered the note or bill the contract of the principal.⁵ So, too, in Connecticut, a promissory note signed, "A., B., vestrymen of the Episcopal Society," made for the corpora-

¹Rew v. Petet, 1 Ad. & El. 196 (1834), Patterson, J., saying, "The makers of the notes could not bind themselves as parish officers; they contract therefore as individuals. Hence the addition of their titles to their signatures cannot destroy their individual liability." So, a note signed "A., B., C., vestrymen of Grace Church," has been held to bind only the individual signers, although given for a corporation debt, Tilden v. Barnard, 43 Mich. 376 (1880). But see, *contra*, as to a note signed in such way but reading "We promise for ourselves and our successors," Creswell v. Holden, 3 MacArth. 579 (1879).

²Courtauld v. Saunders, 16 L. T. (N. S.) 562 (1867).

³Pratt v. Beaupre, 13 Minn. 187 (1868). In this case the individuals signing were held to be *prima facie* liable, but were allowed to show the contrary by parol.

⁴"If a corporation certainly authorized to make, sign, accept or indorse negotiable paper, has an officer authorized to use their name in this way, and this officer writes his own name as drawer of a bill of exchange, with the express addition of his office, it seems that he will be held to do this officially, and not personally, and to bind the corporation and not himself," 1 Pars. N. & B. 168, citing as authority Witte v. Derby Fishing Co., 2 Conn. 260; Safford v. Wyckoff, 1 Hill 11, 4 Hill 442; and Kean v. Davis, 1 Zab. 683. In all of these cases the bill contained a direction to charge the amount to the principal's account. As to other cases containing like direction, see § 140 *infra*.

⁵*Secretary*: Gaff v. Theis, 33 Ind. 307 (1870). *President*: Kennedy v. Knight, 21 Wis. 345 (1867), at least *prima facie*. *Agent for, &c.*: Hovey v. Magill, 2 Conn. 680 (1818). So, too, a deed signed in like manner purporting to be the deed of A. B., "agent of the M. M. Co.," Magill v. Hinsdale, 6 Conn. 465 (1827). *Superintendent*: Schaefer v. Bidwell, 9 Nev. 209 (1874). *Treasurer*: Laffin Powder Co. v. Sinsheimer, 48 Md. 411 (1877), on parol evidence as to consideration and intention. *Chief engineer*: Lazarus v. Shearer, 2 Ala. 718 (1841), on parol evidence.

tion;¹ and, perhaps, with more reason, a note made for the benefit of a corporation by its authorized agent, in form, "I promise," &c., and signed "A. M., agent *for* the M. Mfg. Co."² So, an acceptance by "A. B., agent of the C. Company," of a bill drawn on him in that form, was held, in Connecticut, to be binding on the corporation.³ And a similar conclusion was reached in the case of a note, signed "A. B., agent of the F. B. Co.," by reason of the following language in the note: "I will give," &c., with a condition, "should *we* find, &c., *we* will allow," &c.⁴ The reader is referred to the next and succeeding paragraphs for the effect of a corporate seal, stamped paper and other modifications on bills and notes signed by an agent with or without the principal's name.

§ 138. **Principal Indicated by Corporation Seal or Paper.**— Sometimes the intention to bind the principal is made evident by the use of its *corporate seal*. Thus, a note signed "A., B., C., trustees of St. John's Church," given for a corporation debt and under the corporate seal, is clearly binding upon the corporation and not upon the trustees personally.⁵ So, too, as we have seen, a note under the corporate seal in the form, "We, the President and Directors of the C. S. M. Company, promise," &c., signed "A. B., President."⁶

¹Johnson v. Smith, 21 Conn. 626 (1852). But see Tucker Mfg. Co. v. Fairbanks, 98 Mass. 101, disapproving this case, and to the same effect, Tilden v. Barnard, 43 Mich. 376 (1880).

²Hovey v. Magill, 2 Conn. 680 (1818).

³Shelton v. Darling, 2 Conn. 435 (1818).

⁴Rogers v. March, 33 Me. 106 (1851). In this case the action was against the agent, and great stress was laid on the use of the pronouns as indicating a promise by the company.

⁵Hood v. Hallenbeck, 7 Hun 362 (1876). In the words used by Judge Bockes in this case, "the note *prima facie* created a personal obligation against the makers; but being signed with descriptive words attached to the names and bearing also the corporate seal, the case was open to proof of the facts under which it was given with a view to determine whether it was intended by the partners that they should assume personal liability."

⁶Pitman v. Kintner, 5 Blackf. 250 (1839). So, too, a note in form, "We, the two Directors of the A. L. Ass. Society, by and on behalf of the said Society, promise," &c., attested by the secretary and sealed with the corporate seal, binds the corporation and not the directors personally, Aggs v. Nicholson, 1 H. & N. 165; 25 L. J. Ex. 348 (1856). As to this case, see, also, 25 and 26 Vict. c. 89 § 47.

So, a note, in form, "We promise," &c., signed "W. B. S., Secretary," and sealed with the corporate seal.¹ But in a recent case the Court of Queen's Bench disregarded the corporate seal on a note made, in form, "We, the Directors of the Isle of Man Slate Company, Limited, promise," &c., and signed by the individual names of the directors, and they were held to be personally liable.²

Another indication of corporate rather than individual action is sometimes found in the fact that the bill or note in question is on paper stamped or otherwise *marked with the company's name or dated at the company's office*. Thus, an order on the cashier of the United States Bank, dated "Mechanics' Bank of Alexandria," and signed by W. P., who was the cashier of the Mechanics' Bank, with his individual name alone, was declared to be a corporation order "on its face," and parol evidence was admitted to charge the Mechanics' Bank with the order.³ So, too, a check bearing in the margin the printed words "Ætna Mills," and signed, "J. D. F., treasurer," was held to be the check of the corporation.⁴ So, too, a promissory note dated, "Office of the Dubuque Lumber Company," and signed by the president of the company, "M. H. Moore, P. D. L. Co.," was held to be the company's note although it ran, "I promise," &c.⁵

¹ Means v. Swormstedt, 32 Ind. 87 (1869).

² Dutton v. Marsh, L. R. 6 Q. B. 361 (1871). "It does not purport in form to be a promissory note made on behalf of or on account of the company," Cockburn, C. J.

³ Mechanics' Bank of Alexandria v. Bank of Columbia, 5 Wheat. 326 (1820). So, too, a receipt for money deposited in a bank for the purchase of bonds, signed by the cashier only and charged by the bank to his account, but dated at the banking house, renders the bank liable on parol evidence of the facts, Caldwell v. National Mohawk Valley Bank, 64 Barb. 333 (1869). So, too, and notwithstanding a similar entry on the books of the corporation, a like receipt signed by the president with his individual name only, but dated likewise at the bank with a printed letter-head designating also the names of the principal bank officers, Van Leuvan v. First Nat. Bank of Kingston, 6 Lans. 373 (1871), affirmed 54 N. Y. 671 (1873). Indeed, it was held in this case in the Supreme Court that the paper was *prima facie* a corporation contract, 6 Lans. 378.

⁴ Carpenter v. Farnsworth, 106 Mass. 561 (1871).

⁵ Lacy v. Dubuque Lumber Co., 43 Iowa 510 (1876), the circumstances and intention to bind the company being shown by parol. In like manner a certificate "that there is due from this township," signed "A. B., trustee

So, a draft by the president of a corporation on its treasurer, dated at the company's office, and signed "A. B., President," the intention to bind the corporation being shown by parol and from "indications on the bill itself."¹ So, an order on an Insurance Company by its agents, dated at the "Office of the New England Agency of the" company, and signed simply with the firm name of the agents.² So, a draft by one agent of a company on another, both drawer and drawee being designated by the official addition of "agent," and the draft being dated at the company's office and containing the words, "and charge to the account of this company," is a corporation draft, on which the drawer is not personally liable.³ As to the effect of such words referring to the person to be charged, the reader will find a fuller discussion in a subsequent part of this chapter. Again, a bill of exchange dated at the office of a corporation, drawn by its president on its secretary, and concluding with the words, "charge to Motive Power account," is the bill of the corporation and not of the individual signing it.⁴ So, too, a bill drawn on the secretary of a corporation and dated at its office, and concluding with the words, "charge the same to account of B. J., Superintendent."⁵ So, too, a bill of exchange dated "Pompton Iron Works," and concluding with the words, "which place to account of the Pompton Iron Works, W. B., agent."⁶

Johnson Township," and dated "Treasurer's Office Johnson Township," is the note of the corporation, *Johnson School Township v. Citizens Bank*, 81 Ind. 515 (1882). So, a bill of exchange dated "office of Belleville Nail Co.," concluding "charge same to account of Belleville Nail Co.," and signed "A. B., Prest., C. D., Sec'y," *Hitchcock v. Buchanan*, 15 Otto 416 (1881).

¹ *Wetumpka, &c., R. R. Co. v. Bingham*, 5 Ala. 657 (1843).

² *Chipman v. Foster*, 119 Mass. 189 (1875). In this case, however, the note contained the words: "being in full of all claims and demands against said company for loss and damage under Policy No. 824."

³ *Sayre v. Nichols*, 7 Cal. 535 (1856).

⁴ *Olcott v. Tioga R. R.*, 40 Barb. 179, affirmed 27 N. Y. 546 (1863).

⁵ *Gillig v. Lake Bigler R. R. Co.*, 2 Nev. 214 (1866).

⁶ *Fuller v. Hooper*, 3 Gray 334 (1855). Of this case Metcalf, J., says in *Bank of British North America v. Hooper*, 5 Gray 573: "There was in the margin of the draft, which was apparently a business draft prepared to be used for the Pompton Iron Works, 'Pompton Iron Works.' An agency was thus fully disclosed on the face of the bill and the only further inquiry was whether enough appeared to connect that agency with Horace Gray or the

But this circumstance has not been considered of the same weight in the English courts. Thus, in England, the individual signers were held personally liable on a promissory note dated "Midland Co. Building Society," and reading "We promise, &c. A., B., trustees; C., secretary."¹ So, too, upon a check signed by railway directors with their individual names and stamped with a company stamp. The character of the stamp, however, in this case would probably reconcile it with the American cases above referred to.² And a similar construction has been made in one or two American cases. Thus, a note dated "Commercial Bank of R.," and reading "We promise, &c., A. B., president; C. D., cashier," was held, in Mississippi, to be *prima facie* an individual liability.³ And the individual signers were personally held on a note or obligation beginning with the title of a corporation law suit, of which it was the settlement, "The Butchers' Benevolent Association *vs.* The Crescent City Company. We, the undersigned, bind ourselves to pay *in solido*," &c., and signed with the individual names only. But in this case the form of the promise "to pay *in solido*," undoubtedly had its influence upon the construction.⁴

§ 139. **Principal Indicated by Words:** "In Behalf of"—"On Account of"—"For the Use of"—"By Order of."—In general, if the principal be named in the agent's bill or note and the promise be expressly made *on his behalf*, it will be

Pompton Iron Works. The court were of opinion that it was shown that the signature of Burtt was the signature of an agent; and that the face of the bill indicated who the principal was."

¹Price v. Taylor, 5 H. & N. 540 (1860); 6 Jur. (N. S.) 402; 29 L. J. Ex. 331.

²Serrell v. Derbyshire Ry. Co., 9 C. B. 811 (1850), Maule, J., saying, p. 826: "It does not purport to be drawn by the company in its corporate character. The persons by whom it is drawn, are, in fact, directors of the company, but they do not describe themselves as such. There is no mention whatever of the company, except on the stamp. * * * It is not a substitute for signature like the cross of a marksman. It is not usual or customary to sign a document in this circular form. It looks rather (if one were obliged to construe it) as if this were a document which had passed through the office of the company on such a day and received the stamp as a mode of identifying or ear-marking it, as is usual in some offices."

³Fitch v. Lawton, 6 How. 371 (Miss. 1842).

⁴Cooley v. Esteban, 26 La. An. 515 (1874).

held to be his contract, whatever be the form in which the agent describes and signs himself. This is clearly the case in a note in the following form: "The Pastor and Deacons of the First Baptist Church, in behalf of said church, promise, &c. * * * S. D. G., agent for the First Bapt. Ch."¹ So, too, a note in this form: "For and on behalf of the D. M. Co., I promise, &c., W. R., supt.," especially where the consideration had gone to the company and it had made payments on the note after the agent's death. By these circumstances an estoppel was held to be raised against the denial of the note by the corporation.² And a note in form, "We, the two Directors of the A. L. Ass. Society, by and on behalf of the said Society, promise," &c, signed with the directors' individual names, attested by the secretary and sealed with the corporate seal, was held to be a note of the corporation.³ So, too, notwithstanding the form of the promise, a note, in form, "We, or either of us, promise in behalf of School District No. 6. * * * A. B., president; C. D., secretary; E. F., treasurer."⁴ So, too, a note in form, "We, the trustees of the Methodist Episcopal Church, in behalf of the whole Board of Trustees of said church, promise, * * * for value received by the said Association."⁵ So, a note given expressly "for work done on the N. W. Seminary," and signed, "A., B., C., Building Committee, in behalf of the trustees of the N W. Sem."⁶ So, a contract by C. L., "as agent for and on the part and behalf of S. R.," signed simply C. L., but afterwards ratified, in writing, by S. R., will not involve C. L. in any personal liability.⁷

So, a note in form, "We jointly promise, &c., * * *

¹ *Jefts v. York*, 4 Cush. 371 (1849); S. C., 10 *Id.* 392 (1852), although in this case the agent's authority had been exceeded.

² *Jones v. Clark*, 42 Cal. 180 (1871).

³ *Aggs v. Nicholson*, 1 H. & N. 165; 25 L. J. Ex. 348 (1856). See, as to this case, 25 and 26 Vict. c. 89 § 47.

⁴ *Harvey v. Irvine*, 11 Iowa 82 (1860).

⁵ *Haskell v. Cornish*, 13 Cal. 45 (1859).

⁶ *McHenry v. Duffield*, 7 Blackf. 41 (1843).

⁷ *Spittle v. Lavender*, 2 Brod. & Bing. 224 (1821).

on account of the L. & B. Co., A., B., C., Directors," and attested by the corporation secretary, is a corporation note.¹ And in like manner a memorandum of sale for a bill of exchange "sold you on account of T.," signed "E. F., broker," will bind T. and not the broker personally.² So, a note "for the use of the N. E. P. Union Store," signed "S. S., Treasurer," binds the partnership doing business in the name of the store.³ And the same construction has been applied to a note running: "We, the worshipful master and wardens and trustees of the Mt. Vernon Lodge for its use, promise," &c.⁴ Thus, too, a contract for the hire of slaves "for the use of A. B.," signed by C. D. with his own name simply, was held binding only on A. B.⁵ And the words "by order of" or "by authority of" have the same effect, in general, and render the principal liable and not the agent using them. This is so of a guaranty indorsed on a note by an agent "by authority of" his principal.⁶ So, where a bill of exchange was drawn on the R. S. G. Company, and "accepted by order of the R. S. G. Company, W. E., Secretary," the acceptance was held not to be binding on the individual acceptors.⁷

Some cases have, however, held a contrary doctrine as to the force of such expressions, or at least reached a different conclusion in cases where such words occur. Thus, a note in form, "We, in behalf of the First Methodist Episcopal Society, promise," &c., signed with the individual names only, was held to create at least *prima facie* an individual liability.⁸ So, a contract made by a "committee for the Jackson Lodge * * * on behalf of said Lodge," and

¹Lindus v. Melrose, 3 H. & N. 177 (1858).

²Fairlie v. Fenton, L. R. 5 Exch. 173.

³Dow v. Moore, 47 N. H. 419 (1867).

⁴Pearse v. Welborn, 42 Ind. 331 (1873).

⁵Key v. Parnham, 6 Harr. & J. 418 (1825).

⁶New England Ins. Co. v. DeWolf, 8 Pick. 56 (1829); S. C., 1 Am. L. C. 600.

⁷Eastwood v. Bain, 3 H. & N. 738; 28 L. J. Ex. 74 (1858).

⁸Pomeroy v. Slade, 16 Vt. 220 (1844).

signed "A., B., C., Committee;"¹ or an acknowledgment of debt "on behalf of" a building committee, signed "A. B., chm. com."² So, a promissory note, running: "We promise, &c., * * * on behalf of the Cambridge City Greys," and signed "A., B., C., Secretary;"³ or one, in form, "The President by order of the H. & B. Co., promises," &c., signed "A. B., president, C. D."⁴ And it has even been held that a note in form, "We, as trustees of the Summerfield Methodist Episcopal Church, for and in behalf of said church, promise," &c., and signed "A., B., C., trustees of the S. M. E. Ch.," bound the individual signers and not the corporation.⁵ In another case, where the same result was reached, it was due to the form of the promise as a joint and several one. This was a note, in form, "We jointly and severally promise, &c., * * * for and on behalf of the Wesleyan Newspaper Association," and signed "A. B., C. D., Directors."⁶

In other cases similar results were reached in construing *acceptances* of bills drawn on an individual and accepted by him for a company. This was the case where a bill was drawn on "H. C., general agent of L'Unione Compagna," and "accepted on behalf of the company, H. C.," the acceptor being held personally liable, although the consideration for the acceptance went to the company.⁷ So, too, an acceptance on a bill drawn on W. C. for supplies to the company, "Accepted for the companies, W. C., Purser."⁸

§ 140. **Principal Indicated by Charging to His Account.**—A mere direction in a bill of exchange to charge it to the

¹ *Steele v. McElroy*, 1 Sneed 341 (1853).

² *McCalla v. Rigg*, 3 A. K. Marsh. 259 (1821).

³ *Kendall v. Morton*, 21 Ind. 205 (1863).

⁴ *Caphart v. Dodd*, 3 Bush 584 (1868).

⁵ *Dennison v. Austin*, 15 Wis. 366 (1862). The reason for this conclusion, however, seems to lie in the fact that the note had not been executed in a legal manner by the trustees "lawfully convened."

⁶ *Healey v. Story*, 3 Exch. 3 (1848). In this case "severally" was held equivalent to "*personally*."

⁷ *Herald v. Connah*, 34 L. T. (N. S.) 885 (Exch. Div. 1876).

⁸ *Mare v. Charles*, 5 El. & Bl. 978.

account of another, is not alone sufficient to make the other liable as drawer of the bill. Thus, on a draft concluding, "charge the same to account of proprietors Pembroke Iron Works," and signed "J. B." simply, the signer is personally responsible.¹ This is true also of a bill signed in the same manner and concluding, "place to the account of the Durham Bank," although the signer was known by the holder to be an agent only.² In like manner, a bill concluding with the words, "charge to the account of A. B., agents of the P. Ins. Co.," renders A. B. individually liable.³ This is also the case *prima facie* of a bill concluding with the words, "charge as ordered, J. K., President E. & S. R. R. Co.;"⁴ or "which please place to account of the D. F. Co., A. B., President."⁵ But in such cases parol evidence is admissible to charge the corporation.⁶ So, where a bill was drawn by the president of a corporation on its treasurer, concluding with a request to charge it to the account of the corporation and accepted "F. D. H., treasurer," parol evidence is admissible to charge the corporation and relieve the treasurer from personal liability.⁷

¹Bank of British North America v. Hooper, 5 Gray 567 (1856), Dewey, J., saying, p. 572: "There is no single circumstance on the face of the paper, which in any way connects Horace Gray or the Pembroke Iron Works with the draft, unless it be the direction to the drawees to 'charge the same to the account of Pembroke Iron Works.' It has been urged that this direction indicates that the Pembroke Iron Works are the real drawers. But no such inference can properly be drawn from that circumstance. Bills are often drawn by parties on funds of others distinct from the drawer, but with whom arrangements have been made to discharge such drafts." See, too, Safford v. Wyckoff, 1 Hill 11 (1841). So, too, a bill concluding with the words, "charge the same to account of disbursements of Barque Dublin," signed by the master of the vessel with his own name simply, Bass v. O'Brien, 12 Gray 477 (1859).

²Goupy v. Harden, 7 Taunt. 160; 2 Marsh. 454.

³Tucker Mfg. Co. v. Fairbanks, 98 Mass. 101 (1867), Gray, J., saying, p. 107: "The address of the bill to the corporation and the request to them to charge the amount to the account of the drawers have certainly no tendency to show that the drawers are the same as the corporation, the drawees."

⁴Kean v. Davis, 1 Zab. 683 (1847), reversing Spencer 425. In this case, the bill was held to be *prima facie* an individual bill, but parol evidence was admitted to show that the corporation was intended as maker.

⁵Witte v. Derby Fishing Co., 2 Conn. 260 (1817).

⁶Witte v. Derby Fishing Co., *supra*; Kean v. Davis, *supra*.

⁷Hagar v. Rice, 4 Col. 90 (1878).

Where, on the other hand, the principal is already indicated by a date at the company's office, the addition of a request to place the amount of a draft to its account,¹ or to charge it to its account,² renders the intention to charge the principal plainer; whether the agent sign simply as "agent,"³ or in his full official name, *e. g.* "J. R. W., President T. N. Co."⁴ Indeed, with such date, a draft on "J. E. G., Secretary," concluding, "charge the same to account of B. J., Superintendent," has been held to be a corporation draft.⁵

§ 141. **Principal Indicated by Recital of Consideration Moving to Him.**—It has been held in some cases that a draft or note by an authorized agent for the benefit of his principal is sufficient in itself to bind the principal. But the cases so holding have had some other indication, at least, of such intent on the face of the paper, although this may be merely the full official title of the agent after his signature;⁶ or his official character as a public officer.⁷ In other cases the agent's name has been held to be a name adopted by the principal for purposes of business.⁸ Or the principal may be estopped by conduct which has led the payee into mistake as to the real character of the paper.⁹ These cases, therefore, leave unaltered the general rule, that the fact of benefit to the principal is not of itself sufficient to control the char-

¹Fuller v. Hooper, 3 Gray 334 (1855).

²Olcott v. Tioga Nav. Co., 27 N. Y. 546 (1863), affirming 40 Barb. 179; Sayre v. Nichols, 7 Cal. 535 (1856); Hitchcock v. Buchanan, 15 Otto 416 (1881).

³Fuller v. Hooper, 3 Gray 334; Sayre v. Nichols, 7 Cal. 535.

⁴Olcott v. Tioga Nav. Co., 27 N. Y. 546 (1863), affirming 40 Barb. 179.

⁵Gillig v. Lake Bigler R. R. Co., 2 Nev. 214 (1866).

⁶Johnson v. Smith, 21 Conn. 627 (1852); Thompson v. Tioga R. R., 36 Barb. 79 (1861). But when the agent had no authority to give the note the words "for value received as treasurer of the town of W.," will not render the town liable, although the note is signed "A. B., treasurer," Ross v. Brown, 74 Me. 352 (1883). In this case the treasurer was held on the note as an individual.

⁷Great Falls Bank v. Farmington, 41 N. H. 32 (1860), where a note was given by selectmen for liquor purchased for the town.

⁸Conro v. Port Henry Iron Co., 12 Barb. 27 (1851); Melledge v. Boston Iron Co., 5 Cush. 158 (1849). See, too, Lockwood v. Coley, 22 Fed. Rep. 192 (U. S. C. C. Ga. 1884).

⁹Melledge v. Boston Iron Co., *supra*.

acter of commercial paper and make it the contract of the principal, when it is in form that of the agent only.¹

When, however, the nature of the consideration is expressed in the paper, this circumstance has a natural weight in determining the intention of the parties. Thus, the principal and not the agent is liable on a note expressed to be "for work done on the N. W. Seminary," and signed "A., B., C., building committee, on behalf of the treasurer of the N. W. Sem."² So, a note in form, "We, the trustees of the M. E. Church, in behalf of the whole board of Trustees of said church, promise, &c., * * * for value received by said association."³ So, an order on a company by its agents in their individual name, dated at the company's office and containing the words, "being in full of all claims and demands against said company for loss and damage * * * under policy No. 824."⁴ So, a note in form, "We promise, &c., * * * for and on account of his wages as teacher," and signed "A., B., trustees;"⁵ or "I promise to pay, &c., * * * for building a school house in said district, A. B., Local Director."⁶ So, an order on a Public School Commissioner "for tuition," signed "A., B., trustees."⁷ And where a due-bill was given "in full of labor performed for R. R. Co.," parol evidence was admitted to show whether the intention was to make the company or the agent liable.⁸

This recital of consideration is, however, not conclusive evidence of an intent to bind the principal, as will be seen from the fact that some recent cases have arrived at a

¹And even a note "for work done on the Hazel Valley School House," signed "A., B., C., committee," has been held to render the individual signers liable, *Anderson v. Pearce*, 36 Ark. 293 (1880).

²*McHenry v. Duffield*, 7 Blackf. 41 (1843).

³*Haskell v. Cornish*, 13 Cal. 45 (1859).

⁴*Chipman v. Foster*, 119 Mass. 189 (1875).

⁵*Horton v. Garrison*, 23 Barb. 176 (1856).

⁶*McClellan v. Reynolds*, 49 Mo. 312.

⁷*Tutt v. Hobbs*, 17 Mo. 486 (1853), the case holding that there was no difference in the application of this rule to government officers or private agents.

⁸*Richmond, &c., R. R. Co. v. Snead*, 19 Gratt. 354 (1869). But see, *Carson v. Lucas*, 13 B. Mon. 213 (1852).

different conclusion. Thus, the maker has been held personally liable on a note in form, "For value received in policy No. 100 issued by the H. M. Co., I promise, &c., C. N., President of the D. A. R. R.," notwithstanding that the consideration had been received by the railroad company.¹ So, in a note running, "We, the trustees of O. Academy, promise, &c., * * * for teaching school at, &c., A., B., C.;"² or in a note in form, "The trustees of the N. N. School District, promise, &c., for services of teacher," &c., and signed "A., B., trustees;"³ or, "We, the trustees of the M. E. Society, for building a parsonage house, promise," &c.⁴ This is true also of a receipt for money loaned "to be used to buy rifles * * * the same to be returned as soon as the county bounty is paid," signed "C. D., Capt., 49th Regiment Mo. Vols."⁵

§ 142. **Principal or Agent—Intention Shown by Form of Promise:** "I Promise."—As we have already seen in another part of this work, no great stress can be laid on the use of a singular pronoun in a note signed by several persons or *vice versa*.⁶ In the absence, however, of all other indications, the form of a promise, *e. g.* "I promise," or "We promise," may throw some light on the intent of the maker to bind himself or otherwise. Thus, one who signs a note in such words as "I, J. F., President of the Mech. Ins. Co., promise," &c., binds himself thereby.⁷ So, too, even where the note read, "I, A. B., as trustee of the Louisiana Company, promise," &c., and was signed "A. B., trustee La. Co.," the individual signer was held.⁸ And where a note is in the words, "I

¹ *Haverhill Mut. Ins. Co. v. Newhall*, 1 Allen 130 (1861).

² *Cleveland v. Stewart*, 3 Ga. 283 (1847).

³ *Wiley v. Shank*, 4 Blackf. 420 (1837).

⁴ *Chick v. Trevett*, 20 Me. 462 (1841). "The use of the term 'trustees' indicates," in the language of Weston, C. J., in this case, "rather that the legal interest is in them than that they act as mere agents."

⁵ *Blakely v. Bennecke*, 59 Mo. 193 (1875).

⁶ See Chapter IV.

⁷ *Barker v. Mechanics' Ins. Co.*, 3 Wend. 94 (1829).

⁸ *Rupert v. Madden*, 1 Chandler 146 (1849).

promise," &c., and signed "Samuel W. Snow, Snow, Foote & Co.," under one another, it may be inferred to be an individual obligation, but the whole question is one for the jury as a question of fact.¹ It has also been held that a note reading, "I promise," &c., and signed "C. N., President of the D. A. R. R.," renders the individual liable, although it purports to be for value received by the company.² So, a note reading, "I promise," &c., and signed by several "as trustees of the First Univ. Church."³

But there are many cases where a note reading, "I promise," &c., and signed by an agent, has been held to be binding on the corporation rather than the agent. This was early held in a note reading, "I, G. C., treasurer of the D. T. Co., promise, &c. * * * G. C., Treasurer."⁴ So, too, in the following notes: "I, C. W. L., Director of School District No. 2, promise, &c. * * * C. W. L., Director;"⁵ "I promise, &c., * * * for building a school house in said District, A. B., Local Director;"⁶ "I promise, &c., * * * A. M., agent for the M. Mfg. Co.;"⁷ "For and on behalf of the D. M. Co., I promise, &c., * * * W. R., Supt.;"⁸ "I promise, &c., * * * M. H. Moore, P. D. L. Co.," Moore being the president of the D. L. Co.;⁹ "I promise, as President of the T. O. Co., &c., * * * A. B., Pres. T. O. Co.;"¹⁰ "I will give," &c., with condition

¹*Sherwood v. Snow*, 46 Iowa 481 (1877). As to notes beginning, "I promise," &c., and signed by several, see p. 177 note 4 *supra*.

²*Haverhill Mut. Ins. Co. v. Newhall*, 1 Allen 130 (1861).

³*Burlingame v. Brewster*, 79 Ill. 515 (1875).

⁴*Mann v. Chandler*, 9 Mass. 335 (1812). But this case has been overruled, *Barlow v. Cong. Soc.*, 8 Allen 461. And see § 136 *supra*.

⁵*McGee v. Larramore*, 50 Mo. 425 (1872).

McClellan v. Reynolds, 49 Mo. 312.

⁷*Hovey v. Magill*, 2 Conn. 680 (1818).

⁸*Jones v. Clark*, 42 Cal. 180 (1871). In this case it was shown that the consideration went to the company and that the company paid interest after W. R.'s death, and was estopped from denying the note to be theirs.

⁹*Lacy v. Dubuque Lumber Co.*, 43 Iowa 510 (1876). This note was dated at the company's office, and was shown by parol to have been executed for the company.

¹⁰*Randall v. Snyder*, 1 Lans. 163 (1869), although the note was *ultra vires*.

“should we do, &c., *we* will allow * * * A. B., agent of the F. B. Co.”¹

§ 143. “**We or Either of Us**”—“**Jointly and Severally.**”—On the other hand, “*we promise*” seems the natural form of words for a corporation’s promise, if the name itself is not used in the body of the note. Many instances have been already given of notes in this form, some construed as corporate obligations and others not. Nor are these decisions always easily reconcilable. Thus, a note in this form, “We promise,” &c., signed “W. B. S., Secretary,” and sealed with the corporate seal, has been held in Indiana to be a note of the corporation;² while in England a note reading, “We, the Directors of the A. B. Company, promise,” &c., signed with the individual names of the directors simply, was held to be their personal obligation, although sealed with the corporate seal.³ But in England it was held that a note in the form, “We *jointly* promise, &c., * * * on account of the L. & B. Company,” signed “A., B., C., Directors,” and attested by the secretary, was a note of the corporation;⁴ and in Louisiana an equally joint promise reading, “The Butchers’ Benevolent Association *vs.* Crescent City Co., We, the undersigned bind ourselves to pay *in solido*,” &c., signed with the individual names simply, was held to be an individual note.⁵

And it seems that the expression “*we or either of us*” forms no more certain guide as to the party to be bound. Thus, in a promissory note in the form, “We or either of us, Directors of the T. Company, promise,” &c., signed “A. B., Pres., C. D., E. F.,” the individual signers were held personally liable.⁶ So, too, even in a note reading, “We or

¹ *Rogers v. March*, 33 Me. 106 (1851).

² *Means v. Swormstedt*, 32 Ind. 87 (1869).

³ *Dutton v. Marsh*, L. R. 6 Q. B. 361 (1871).

⁴ *Lindus v. Melrose*, 3 H. & N. 177 (1858). So, too, a note running, “We promise for ourselves *and our successors*,” &c., signed “A., B., C., Vestrymen of St. John’s Parish,” and given for land bought for the parish, has been held to be binding on the corporation only, *Creswell v. Holden*, 3 MacArth. 579 (1879).

⁵ *Cooley v. Esteban*, 26 La. An. 515 (1874).

⁶ *Whitney v. Sudduth*, 4 Metc. 296 (Ky. 1863).

either of us, *as* Directors of the H. M. & G. Road, promise," &c.¹ But the school district was held on a note reading, "We or either of us promise * * * in behalf of the School District No. 6. A. B., Pres.; C. D., Secy.; E. F., Treasurer."²

A *joint and several* promise is, however, generally a personal one, and the individuals are bound by it and not the corporation. This has been the construction in England of the following note: "We jointly and severally promise * * * for and on behalf of the Wesleyan Newspaper Association, A., B., C., Directors;"³ and, in the United States, of a note: "We, as trustees of the town of H., jointly and severally promise * * * A., B., C., trustees."⁴

§ 144. **Principal Indicated by Agent's Promise "as" such.**—If, indeed, a promise is made by an agent, trustee or other officer *as agent*, &c., the intention to bind the principal only is apparently clear. There is not wanting, however, the usual array of cases to the contrary. So far as these opposing cases turn only upon that expression, they cannot be regarded as authorities of any value. An intention to bind the corporation as an expressed principal and not the agent himself, has been held to be manifest in the following notes: "The trustees of the Third Church, as such trustees, promise," &c., signed by each "as trustee of the Third Church;"⁵ "We, as trustees of the A. & W. R. R. Company, promise," &c., signed "A., B., C., trustees of the A. & W. R. R. Co.;"⁶

¹Titus v. Kyle, 10 Ohio St. 444 (1859).

²Harvey v. Irvine, 11 Iowa 82 (1860).

³Healey v. Story, 3 Exch. 3 (1848). Here the word "severally" was held equivalent to *personally*.

⁴Trask v. Roberts, 1 B. Mon. 201 (1841). And see, Savage v. Rix, 9 N. H. 263 (1838), where road commissioners were held individually liable on a joint and several note, though made expressly "in official capacity" and signed "A. B., C. D., Road Commissioners." This case seems, however, to have turned on the commissioners' want of authority to execute the note. But see, *contra*, Rice v. Gove, 22 Pick. 158 (1839), where the note read "We jointly and severally promise," &c., but was signed "R. & J. for G.," and G. was held as the maker.

⁵Little v. Bailey, 87 Ill. 239 (1877).

⁶Blanchard v. Kaull, 49 Cal. 440 (1872), although there be no such corporation as that named, or no authority to execute a note for it.

I promise, as President of the T. O. Company," &c., signed "A. B., President of the T. O. Company;"¹ "We, as trustees of the Methodist Episcopal Church, promise," &c., signed "A., B., trustees;"² "We, as trustees of School District No. 10, promise," &c., signed with their individual names only;³ "We, the trustees of the Evangelical German Church, for ourselves as such trustees and our successors in office, promise and bind ourselves for said congregation and such successors in office," &c., signed "A., B., C., trustees;"⁴ "I, as treasurer of the Congregational Society, or my successors in office, promise," &c., signed "A. B., treasurer."⁵ So, too, a contract by "C. L., as agent for and on the part and behalf of S. R.," signed by C. L. and afterward ratified in writing by S. R., is not binding upon C. L. personally.⁶

Other cases, turning in some instances as will be seen on other circumstance or expression, hold such a contract or note to be that of the agent only. Thus, a draft signed by several "as commissioners," has been held to be binding

¹ *Randall v. Snyder*, 1 Lans. 163 (1869), although the note in question was *ultra vires*.

² *Leach v. Blow*, 8 Sm. & M. 221 (1847). And this note was not admissible in evidence, it was held, in an action against the individual trustees.

³ *Sanborn v. Neal*, 4 Minn. 126 (1860), Emmett, C. J., saying: "As the primary object in all cases is to ascertain what the parties really intended to declare by the language used, it should make no material difference whether this intention appears in the signature or the body of the instrument." It was held in this case that the trustees were exempt as known public officers. But a different result was reached in the same court where the note read, "We promise," &c., A., B., C., "trustees of School District No. 5," *Fowler v. Atkinson*, 6 Minn. 578 (1861). This is also *prima facie* the case where the note is drawn, "We, the trustees of School District No. 10, promise, &c., A. B., trustees," leaving on the plaintiff the *onus probandi*, *Bingham v. Stewart*, 13 Minn. 106 (1868).

⁴ *Klosterman v. Loos*, 58 Mo. 290 (1874), parol evidence being admissible to show such intention, if necessary.

⁵ *Barlow v. Cong. Soc.*, 8 Allen 460 (1864). "Even the insertion in a promissory note of the word 'as' between the name of the signer and the description of his relation to another person, has been held not sufficient to exempt him from personal liability where the note showed upon its face that no other person was legally bound; as in the case of a promissory note made by a guardian 'as guardian,'" Gray, J., p. 464. But of the note in question in the suit, he says, p. 465: "The note not only names the principal, describes the relation between the principal and the agent, and declares the note to be made in execution of the agency, but it cannot take effect according to its terms except as the note of the principal."

⁶ *Spittle v. Lavender*, 2 Brod. & Bing. 224 (1821).

upon them personally;¹ or a sealed covenant signed and sealed by A. B. "as agent;"² or a contract of sale made for a principal residing abroad and signed "as agents for J. S. & Co., W. & S."³ So, a promissory note reading, "We or either of us, as Directors of the H. M. & G. Road, promise," &c.;⁴ or, "We, as trustees of the town of H., jointly and severally promise," &c., signed "A., B., C., trustees;"⁵ or, "I, A. B., as trustee of the Louisiana Company, promise," &c., signed "A. B., trustee La. Co.;"⁶ or, "We, as committeemen for the erection of a school-house in District No. 3, promise," &c., signed with the individual names only.⁷ So, too, "We, as trustees of the Summerfield Methodist Episcopal Church, for and in behalf of said church, promise," &c., signed "A., B., trustees of the S. M. E. Ch., but not executed in a legal manner by the trustees "lawfully convened."⁸

¹ Byles 76; *Eaton v. Bell*, 5 B. & Ald. 34; *Nichols v. Diamond*, 9 Exch. 154; *Bottomley v. Fisher*, 1 H. & C. 211.

² *Stone v. Wood*, 7 Cow. 453 (1827).

³ *Paice v. Walker*, L. R. 5 Ex. 173 (1870). But in *Gadd v. Houghton*, L. R. 1 Exch. D. 357 (1876), where a different conclusion was reached as to a contract for sale of oranges, "on account of J. M. & Co., Valencia," signed "J. C. H. & Co.," Lord Justice James said, p. 359: "The case is not, in my opinion, in any way governed by *Paice v. Walker*; for whatever the decision was in that case upon the words 'as agents,' the words in the present case, 'on account of,' are not at all ambiguous and it would be impossible to make them words of description. The *ratio decidendi*, in *Paice v. Walker*, was that, having regard to the contract and all the circumstances of the case, the words 'as agents' must be considered as merely describing or intimating the fact that the defendants were agents, and did not amount to a statement that they were making a bargain 'on account of' another person. Those are the very words used in the present case. When a man says that he is making a contract 'on account of' some one else, it seems to me that he uses the very strongest terms the English language affords to show that he is not binding himself, but is binding his principal. As to *Paice v. Walker*, I cannot conceive that the words 'as agents' can be properly understood as implying merely a description. The word 'as' seems to exclude that idea. If that case were now before us, I should hold that the words 'as agents' in that case had the same effect as the words 'on account of' in the present case, and that the decision in that case ought not to stand. I do not dissent from the principle that a man does not relieve himself from liability upon a contract by using words which are intended to be merely words of description, but I do not think the words 'as agents' were words of description."

⁴ *Titus v. Kyle*, 10 Ohio St. 444 (1859).

⁵ *Trask v. Roberts*, 1 B. Mon. 201 (1841).

⁶ *Rupert v. Madden*, 1 Chandler 146 (1849).

⁷ *Bayliss v. Pearson*, 15 Iowa 279 (1863).

⁸ *Dennison v. Austin*, 15 Wis. 366 (1862).

§ 145. **Principal Indicated as Acceptor or Indorser by Drawee's or Payee's Name.**—The principles already laid down as to the individual liability of an agent drawing a bill or note in his own name are in general applicable to acceptances and indorsements by an agent. In an acceptance or indorsement, however, there is an additional means for ascertaining who is to be bound in the way in which the bill or note is drawn. Thus, if the bill or draft is drawn upon the principal by name and accepted by the agent in his own name, it will be deemed to be the acceptance of the principal and not of the agent.¹ And this is still plainer in the case of a bill drawn upon a company and "accepted by order of the R. S. G. Company, W. E., Secretary;"² or drawn on the company by a wrong name and "accepted, A. B., manager;"³ or drawn on a company and "accepted, A., B., Directors," &c., such acceptance being, moreover, attested by the secretary.⁴ But where a bill is drawn on the agent "and owners" of a vessel and accepted by the agent only in his individual name, he alone is liable on the acceptance.⁵

Again, if a note be made to a corporation and indorsed "A. B., Atty.," or "A. B., President," it is an indorsement by the corporation.⁶ And this, as we have seen, is a matter of every-day occurrence in the indorsement by cashiers of paper made payable to their banks. But where a note was made payable to the Fire Brick Company and indorsed, "Fire Brick Co., A. B., treasurer, C. D.," the latter is per-

¹ *Lindus v. Bradwell*, 5 C. B. 583. See also, *Gurney v. Evans*, 27 L. J. Exch. 166; S. C., 3 H. & N. 122; *Edmunds v. Bushell*, 35 L. J. Q. B. 91.

² *Eastwood v. Bain*, 3 H. & N. 738; 28 L. J. Exch. 74 (1858).

³ *Hascall v. Life Association*, 5 Hun 151 (1875).

⁴ *Okell v. Charles*, 34 L. T. (n. s.) 822 (Eng. Ct. App. 1876). So, an order addressed to a corporation and "accepted, A. B., treasurer," is accepted by the corporation, *Rogers v. Union Stone Co.*, 134 Mass. 31 (1883).

⁵ *Taber v. Cannon*, 8 Mete. 456 (1844). But an acceptance "Str. Dorrance per G. M., agent," of a bill drawn on "Steamer Dorrance and owners," binds the owners and not the agent, *Alabama Coal Mining Co. v. Brainard*, 35 Ala. 476 (1860).

⁶ *Merchants' Bank v. McCall*, 6 Bosw. 473 (1860); *Elwell v. Dodge*, 33 Barb. 336 (1861); *Clark v. Titcomb*, 42 Ib. 122 (1864); *Marine Bank v. Clements*, 31 N. Y. 33 (1865); *Russell v. Folsom*, 72 Me. 436 (1881). This is at least *prima facie* the company's act, *Goodrich v. Reynolds*, 31 Ill. 490 (1863).

sonally liable and cannot be discharged by parol evidence that he indorsed the note as president of the company.¹ A mere misnomer of the corporation in the indorsement leaves it still the company's indorsement, *e. g.* where a note to the Southern College of Kentucky was indorsed, "Trustees of Southern College, by A. W. G."²

So, in general, the corporation or other principal will be liable as acceptor of a bill drawn upon its agent, and accepted by him, *as such agent*. This is true in the case of a bill or draft on "A. B., treasurer of the T. H. R. R. Co.," "accepted, A. B., treasurer;"³ even though the bill was drawn in fraud of the company and without its knowledge.⁴

Where, however, a bill drawn on "H. B., cashier of the Y. B. Co.," is accepted by H. B. in his individual name, he only is liable on the acceptance.⁵ And this has been held also in case of an acceptance by "A. B., agent," of a bill drawn on "A. B., agent," by "C. D., agent," although the bill was dated at the company's office and concluded "charge to the account of this company;"⁶ and also of a bill drawn on "H. C., general agent of L'Unione Campagna" and "accepted on behalf of the company, H. C.," although the consideration went to the company.⁷

In like manner, where a bill is drawn on any one in his individual name and accepted by him with the addition of an official name, as "A. B., treasurer of the L. & M. Co.,"

¹ *Condon v. Pearce*, 43 Md. 83 (1875).

² *Garrison v. Combs*, 7 J. J. Marsh. 84 (1831).

³ *Tousey v. Taw*, 19 Ind. 212 (1862). In the similar case of *Amison v. Ewing*, 2 Coldw. 367 (1865), an action against the acceptor individually was defeated on the ground that the treasurer of the railroad company "acted in the character of a *public agent*!"

⁴ *Shelton v. Darling*, 2 Conn. 435 (1818).

⁵ *Thomas v. Bishop*, 2 Stra. 955; *Rew v. Pettet*, 1 Ad. & El. 196; S. C., 3 Nev. & M. 456; *Lallerstedt v. Griffin*, 29 Ga. 708 (1860). And it is negligence on the part of an agent to receive such acceptance, *Exchange Nat. Bank v. Third Nat. Bank*, 112 U. S. 276 (1884), reversing 4 Fed. Rep. 20 (1880).

⁶ *Slawson v. Loring*, 5 Allen 340 (1862). But on an exactly similar bill the corporation, *Adams Express Co.*, and not the agent was held to be liable as maker in *Sayre v. Nichols*, 7 Cal. 535 (1856).

⁷ *Herald v. Connah*, 34 L. T. (N. S.) 885 (Exch. Div. 1876), *Bramwell v. B.*, saying: "Bearing in mind that * * * the bill is addressed personally to the defendant, it must be taken that it was accepted so as to make it a good acceptance."

the drawee is *prima facie* personally liable on his acceptance.¹ Parol evidence is admissible in such case, however, to show an intention to bind the company and that the consideration went to the company.² But a bill of exchange drawn on a purser individually for supplies to his company and "accepted for the company, W. C., purser," has been held, in England, to bind him individually.³ And so even an acceptance by "A. B., purser, per procuration W. D. M. Company."⁴ On the other hand, in the United States, a bill drawn on A. B., "accepted, payable on return of March estimates, A. B., treasurer," has been held to bind the company.⁵ And a bill of exchange drawn by C. D. on A. B. and "accepted, A. B., agent of C. D.," is equivalent, it has been held, to a note of C. D., and is not binding upon the acceptor personally, the intention to bind the principal being shown by parol.⁶

§ 146. **Signature by Agent—Foreign Statutes.**—It is not necessary that an agent should adopt any particular manner of signature to effect his intention of binding his principal only. Whatever shows this intention clearly is sufficient, in the absence of specific statutory requirements. The proper and usual way, however, is for the agent to sign his principal's name, adding his own name and official title or designation as agent, *e. g.* "A. B., by C. D., agent." He may, however, if authorized to sign for his principal, sign the

¹Bruce *v.* Lord, 1 Hilt. 247 (1856); Laflin Powder Co. *v.* Sinsheimer, 48 Md. 411 (1877). So, a similar acceptance corresponding, however, to the form of the drawee's name on the bill, Moss *v.* Livingston, 4 N. Y. 208 (1850); Haight *v.* Naylor, 5 Daly 219 (1874). But *contra*, Shelton *v.* Darling, 2 Conn. 435 (1818). And see Walker *v.* Bank of the State of N. Y., 9 N. Y. 582 (1854), where the acceptance was in the corporation name, "by A. B., treasurer."

²Laflin Powder Co. *v.* Sinsheimer, 48 Md. 411 (1877); Bruce *v.* Lord, 1 Hilt. 247 (1856). And an acceptance "for the Opinion newspaper, W. L. S.," of an order drawn on W. L. S., individually binds the partners owning the paper, although the partnership name was not used, Markham *v.* Scruggs, 48 Ga. 570 (1873).

³Mare *v.* Charles, 5 El. & Bl. 978.

⁴Nichols *v.* Diamond, 9 Exch. 154.

⁵Amison *v.* Ewing, 2 Coldw. 367 (1865). As to this case, see § 145 *supra*.

⁶Hardy *v.* Pilcher, 57 Miss. 18 (1879).

principal's name only.¹ But this course renders the proof of execution more difficult and is to be avoided. In the same way, one of two joint makers of a note may sign both names, if authorized, without any words indicating his agency, and charge his co-maker by parol proof of his authority and act.² And an agent may bind his principal by signing his own name first, *e. g.* "A. B., agent for C. D."³ Where, however, a signature in this form failed to designate the principal by name, but referred only to a newspaper, of which he was proprietor, *e. g.* "D. H., agent for The Churchman," the agent was held to be personally liable.⁴ The word "agent" is not a necessary part of an agent's signature. Thus, he may sign "A. B., by C. D." And in like manner it is sufficient to bind his principal, if he sign "C. D., for A. B."⁵ So, too, even a note reading, "We jointly and severally promised," &c., and signed "R. & J., for G.," is sufficient to bind G. only.⁶ And a joint note signed "W. S., for

¹First Nat. Bank *v.* Whitney, 4 Lans. 34 (1871). Perhaps it is better to avoid the doubt altogether by putting the principal's name as promisor into the body of the note, Hamilton *v.* Newcastle, &c., R. R. Co., 9 Ind. 359 (1857).

²Morse *v.* Green, 13 N. H. 32.

³Ballou *v.* Talbot, 16 Mass. 461 (1820); Olcott *v.* Little, 9 N. H. 259 (1838); Webb *v.* Burke, 5 B. Mon. 51 (1844); Tiller *v.* Standley, 39 Ga. 35 (1869). But see, *contra*, in case of a sealed note, Dawson *v.* Cotton, 26 Ala. 591 (1855). So, too, a sealed covenant signed "A. B. for the Directors," White *v.* Skinner, 13 Johns. 307 (1816). A sealed bond, however, signed in this manner, given expressly for the performance by the principal of a certain act, binds the principal only, if the agent has proper authority, Deming *v.* Bullitt, 1 Blackf. 241 (1823).

⁴The note not being shown to have been given in the principal's business, De Witt *v.* Walton, 9 N. Y. 571 (1854). But see, as to this case, Green *v.* Skeel, 2 Hun 485. And in Shattuck *v.* Eastman, 12 Allen 369, a contract signed "Robert Eastman, Agent for Ward 6, Lowell, Mass.," it was held, might be binding on the agent personally.

⁵Scott *v.* Johnson, 5 Bosw. 213 (1859); Long *v.* Colburn, 11 Mass. 97 (1814); Robertson *v.* Pope, 1 Rich. 501 (1845), overruling Fash *v.* Ross, 2 Hill 292 (So. Car. 1834); Hovey *v.* Magill, 2 Conn. 680 (1818); King *v.* Handy, 2 Bradw. 212 (1878); Wheelock *v.* Winslow, 15 Iowa 464 (1863); Roney *v.* Winter, 37 Ala. 277 (1861). But see, *contra*, Musgrove *v.* McIlroy, 5 J. J. Marsh. 646 (1831); Offutt *v.* Ayres, 7 T. B. Mon. 356 (1828), Bibb, C. J., dissenting; Taylor *v.* McLean, 1 McMull. 352 (overruled by Robertson *v.* Pope, *supra*); Moore *v.* Cooper, 1 Spears 87 (overruled by Robertson *v.* Pope, *supra*); Early *v.* Wilkinson, 9 Gratt. 68 (1852), where the principal's name was in brackets and the agent's authority was not shown; McBean *v.* Morrison, 1 A. K. Marsh. 545 (1819).

⁶Rice *v.* Gove, 22 Pick. 158 (1839).

himself and G. L.," binds both, if there is proof of authority to sign for G. L.¹

A special provision is now made by statute, in England, for the execution of notes and bills on behalf of a company.² And the laws of Spain, and of most of the Spanish-American States, require every bill of exchange or note made, accepted or indorsed by an agent, to be made, accepted or indorsed under a special power of attorney, and to state that fact.³ The Hungarian Exchange Law in like manner makes the agent signing a bill or note individually liable, unless he expresses the fact that he signs only as attorney for another.⁴

§ 147. **Parol Evidence—Disclosing Principal—Discharging Agent.**—Parol evidence is generally admitted in simple contracts to disclose the principal for whom the contract is made, either for the purpose of charging him with the burden or giving him the benefit.⁵ On the other hand, it is rejected, if offered for the purpose of discharging an agent who has signed in such manner as to render himself personally liable.⁶

¹Olcott v. Little, 9 N. H. 259 (1838).

²By the Companies' Act of 1862, 25 and 26 Vict. c. 89 (repealing the Joint Stock Companies Act of 1856, 19 and 20 Vict. c. 47) § 47, "a promissory note or bill of exchange shall be deemed to have been made, accepted or indorsed on behalf of any company under that act, if made, accepted or indorsed in the name of the company, or if made, accepted or indorsed by or on behalf or on account of the company by any person acting under the authority of the company."

³Argentine Republic (1862 Code Com. Art. 785); Bolivia (1834 Code Com. Art. 369); Colombia (1853 Code Com. Arts. 393, 424); Costa Rica (1853 Code Com. Arts. 382, 414); Ecuador (same as Spain); Salvador (1855 Code Com. Arts. 390, 421); Spain (1829 Code Com. Arts. 435, 467).

⁴Hungary (1860 Exch. Law § 27).

⁵Byles 38; Bickerton v. Bunell, 6 M. & S. 383; Rayner v. Grote, 15 M. & W. 359; Williams v. Bacon, 2 Gray 387 (1854); Dyer v. Burnham, 25 Me. 9 (1845); Eastern R. R. Co. v. Benedict, 5 Gray 562 (1856), where the order in suit was made payable to "J. S., President of the Eastern R. R. Co." And this is so of an action against a corporation for work done, although the president may have given a due-bill for it in his individual name, there having been no election of the president individually as the debtor, Richmond R. R. Co. v. Snead, 19 Gratt. 354 (1869).

⁶Nash v. Towne, 5 Wall. 703 (1866). In this case the agent was not allowed to prove in his own discharge that the principal for whom he acted was mentioned by him at the time of making the contract and was known to the other contracting party to be the real party for whom the contract was made. But the rule adopted in Louisiana is opposed to this decision, Krumbhaar v. Ludeling, 1 Martin 700 (1815). And in Louisiana the drawee

But in commercial paper there must be some indication of the principal on the face of the paper, or he cannot be holden as a party to it. Thus, parol evidence is inadmissible to charge one person on a promissory note signed by another simply with his own name.¹ But it has been said that such a word as "agent," added to the signature of the maker of a note, is of itself notice that the signer intended

of a bill at suit of the payee may be discharged by showing that he was merely the agent of the drawee and acceptor, and that the bill was given for the debt of the drawee to the payee, *Wolfe v. Jewett*, 10 La. 883 (1830).

¹ Byles 38; 1 Daniel 286; *Stackpole v. Arnold*, 11 Mass. 27 (1814); *Bedford Commercial Ins. Co. v. Covell*, 8 Metc. 442 (1844); *Heaton v. Myers*, 4 Col. 59 (1878). But see *Mechanics' Bank v. Bank of Columbia*, 5 Wheat. 326 (1820), where a bank was held by parol evidence on a check signed by its cashier with his own name simply. And the rule laid down in the text is not followed in Louisiana, where the principal is known to the payee at the time of making the note, *Milligan v. Lyle*, 24 La. An. 144 (1872). And to like effect, see *Roberts v. Austin*, 5 Whart. 313 (1839).

But a certificate of deposit in this form, fraudulently given by a bank president and innocently accepted by the depositor, will not preclude the latter from his right of action against the bank for money had and received, *Coleman v. First Nat. Bank*, 53 N. Y. 388 (1873). In this case Andrews, J., said, p. 392: "The money was paid to and received by the teller of the bank, and up to the point where the certificate was given, the dealing, as shown by the act of the parties, was between the plaintiff and the bank, and not between the plaintiff and Van Campen. Leaving out of view the certificate, the liability of the defendant is clear. * * * It is insisted, however, that the certificate issued to the plaintiff at the time of the deposit conclusively establishes that the transaction was with Van Campen and upon his sole credit. The certificate is said to be a written contract, by which alone the right of the plaintiff is to be determined, and that parol proof that the deposit was made with the bank, or tending to establish a liability of the bank, was inadmissible. * * * But assuming that the certificate signed by Van Campen, when accepted by the plaintiff, became a written contract between them, parol evidence that the bank received the money as a deposit did not contradict any written agreement between the bank and the plaintiff, for they had made none. * * * Unexplained, the fact that the plaintiff accepted the certificate of Van Campen was strong if not conclusive evidence that the bank was not a party to the transaction; but it was evidence only, and was subject to explanation by parol proof without violating the rule referred to. * * * The rule does not preclude a party who has entered into a written contract with an agent from maintaining an action against the principal upon parol proof that the contract was made in fact for the principal, where the agency was not disclosed by the contract and was not known to the plaintiff when it was made, or where there was no intention to rely upon the credit of the agent to the exclusion of the principal. Such proof does not contradict the written contract." See, too, *Ford v. Williams*, 21 How. 207; *Higgins v. Senior*, 8 M. & W. 834; *Short v. Spokman*, 2 B. & Ad. 962; *Taintor v. Prendergast*, 3 Hill 72; *Gates v. Brower*, 9 N. Y. 205; *Barry v. Ransom*, 12 N. Y. 464. And such a certificate of deposit may be rescinded and the bank sued for money had and received, *Shields v. Niagara Sav. Bank*, 3 Hun 477 (1875); *Rich v. Niagara Sav. Bank*, *Ib.* 481. See, too, *Caldwell v. Nat. Mohawk Valley Bank*, 64 Barb. 333 (1869); *Van Leuvan v. First Nat. Bank of Kingston*, 6 Lans. 373 (1871), affirmed 54 N. Y. 671 (1873).

not to be bound personally.¹ And where a note is signed in this way and the principal is at the time made known to the payee, it seems that parol evidence is admissible to charge him on the note;² especially if such note have been given in the course of the principal's business.³ This is equally true of a note signed by corporation trustees with the simple addition to their signature of the word "trustees."⁴

When the name of the corporation for which an agent acts is expressed in the signature or in the body of the instrument by the agent's official title, the instrument, as we have seen, is still *prima facie* the bill or note of the agent individually, but parol evidence is in such case admissible between the original parties to charge the principal.⁵ So, too, where a note read, "The President and Directors of the D. V. Company promise," &c., and was signed "A. B., President; C. D., E. F., Directors; G. H., Secretary."⁶ In like manner the fact of a bill or note being dated at a corporation office, coupled with any indication of agency in the maker's signature, readily raises a presumption of its being the contract of the corporation, and parol evidence is admissible to establish that fact and hold the corporation;⁷ especially where

¹Conro v. Port Henry Iron Co., 12 Barb. 27 (1851). And in Indiana a principal is held on such agent's signature in equity but not at law, Kenyon v. Williams, 19 Ind. 44 (1862).

²Hicks v. Hinde, 9 Barb. 528 (1850); Rathbun v. Badlong, 15 Johns. 1 (1818); Pease v. Pease, 35 Conn. 131 (1868); Baldwin v. Bank of Newburg, 1 Wall. 234 (1863), where the note was made to and indorsed by, "A. B., cashier," without naming any bank. But see, *contra*, Collins v. Buckeye State Ins. Co., 17 Ohio St. 215 (1867).

³Moore v. McClure, 8 Hun 558 (1876); Green v. Skeel, 2 Ib. 485, not following De Witt v. Walton, 9 N. Y. 571, so far as it conflicts.

⁴Hypes v. Griffin, 89 Ill. 134 (1878).

⁵Hood v. Hallenbech, 7 Hun 362 (1876); Lazarus v. Shearer, 2 Ala. 718 (1841); Lafin Powder Co. v. Sinsheimer, 48 Md. 411 (1877); Wyman v. Gray, 7 Harr. & J. 409 (1826). Especially where the instrument read, "We assign," &c., and was signed "J. H. S., Prest. N. M. R. R. Co.," and was sealed with the corporate seal and attested by the company's secretary, Musser v. Johnson, 42 Mo. 74 (1868).

⁶Haile v. Peirce, 32 Md. 327 (1869); Yowell v. Dodd, 3 Bush 581 (1868).

⁷Lacy v. Dubuque Lumber Co., 43 Iowa 510 (1876), where the note was signed by the president of the company with the initials, "P. D. L. Co.," added to his signature, and bore date at the office of the D. L. Co. So, too, a draft dated at the company's office, drawn by its president on its treasurer, and signed "A. B., President," Wetumpka, &c., R. R. Co. v. Bingham, 5 Ala. 657 (1843).

such a draft contained the further direction to "place to account of the company."¹ And parol evidence has been admitted, as we have seen, by the United States Supreme Court, to charge a banking company on a draft drawn by its cashier in his individual name, but dated at the bank, this being declared a sufficient indication "on its face" of a corporate character.²

The drawee's name in a bill accepted by his agent is likewise an indication that an acceptance for the principal was intended, and parol evidence is admissible to charge him.³ And where a bill drawn by A. on B., in his individual name, was accepted by B., adding to his signature, as acceptor, "agent of A.," B. was discharged and A. held by parol as virtually maker of a promissory note.⁴ So, a note signed "R. & J. for G.," may be shown by parol to be the note of G. only.⁵

But courts are more reluctant to discharge the agent by parol evidence of circumstances showing another's liability as principal, where the agent appears on the paper to be the sole party liable. If he has signed the instrument with his own name and there is no indication on its face of any agency for another, such evidence will be rejected.⁶ If, however, the agency and the principal for whom the agent acts are both indicated, although it be only in the official title of the agent or officer signing the instrument, while the agent is in such case *prima facie* liable, he may be discharged by parol evidence of

¹ Fuller v. Hooper, 3 Gray 334 (1855), the draft in this case being marked with the company's name in the margin, and signed "W. Burt, Agt." And parol evidence has been admitted to bind the owners of a vessel on a bill concluding, "charge the same to account of disbursements of Barque Dublin," and signed by the master with his individual name only, Bass v. O'Brien, 12 Gray 477 (1859).

² Mechanics' Bank of Alexandria v. Bank of Columbia, 5 Wheat. 326 (1820).

³ May v. Hewitt, 33 Ala. 161 (1858), the bill being drawn on "The owners of the Steamboat Messenger," and "accepted, A. B., Capt."

⁴ Hardy v. Pitcher, 57 Miss. 18 (1879).

⁵ Rice v. Gove, 22 Pick. 158 (1839), and it may be shown in discharge of an agent on such a note that he never delivered it as his note, Owings v. Grubbs, 6 J. J. Marsh. 31 (1831).

⁶ Byles 38; Story on Bills § 76; Higgins v. Senior, 8 M. & W. 834; Hancock v. Fairfield, 30 Me. 299 (1849); Collins v. Buckeye State Ins. Co., 17 Ohio St. 215 (1867); Bartlett v. Hawley, 120 Mass. 92 (1876); Brown v. Parker, 7 Allen 339 (1863).

an intention to bind the principal;¹ especially if the promise be made “as such trustees,” &c.;² although the mere addition of the word “trustee,” “agent,” &c., to the individual name signed, is not sufficient for this purpose.³ And such evidence has been held admissible to discharge an agent accepting, with the addition of the words “agent of C. D.,” a bill drawn on him in his own name by C. D.⁴ And in Louisiana, where the rule is in this regard a liberal one, the drawer of a bill in his own name may exonerate himself at suit of the payee by showing that he acted only as agent of the drawee and that the bill was given for the debt of the drawee to the payee.⁵ Whereas in Maryland, on the contrary, the president of a company, indorsing with his individual name a note which was payable to the company and was also indorsed “F. B. Company, A. B., treasurer,” was not allowed to exonerate himself by evidence that he acted for the company only.⁶

Between principal and agent a more liberal rule is adopted and the agent may be exonerated by parol evidence from liability to his principal on paper actually drawn or indorsed on his account.⁷ At suit of other parties, however,

¹ *Laffin Powder Co. v. Sinsheimer*, 48 Md. 411 (1877); *Bruce v. Lord*, 1 Hilt. 247 (1856), where the liability in question was that of an acceptor in this form of a bill drawn on him individually; *Smith v. Alexander*, 31 Mo. 193 (1860); *Drake v. Flewellen*, 33 Ala. 106 (1858); *Lazarus v. Shearer*, 2 Ala. 718 (1841); *Bingham v. Stewart*, 13 Minn. 106 (1868). So, in the case of an agent who signed a note “A. B., Gen. Manager and Supt. St. L. M. Co.,” *Gerber v. Stuart*, 1 Mont. 172 (1870). So, too, of other simple contracts, *Pratt v. Beaupre*, 13 Minn. 187 (1868). But see, *contra*, as to notes, *Sturdivant v. Hull*, 59 Me. 172 (1871). And on the other hand, a note signed in this way has been held to be *prima facie* the note of the corporation, *Kennedy v. Knight*, 21 Wis. 345 (1867).

² *Klosterman v. Loos*, 58 Mo. 290 (1874). Indeed, a note of this description has been held not to be admissible as evidence of a debt in an action against the individual trustees, *Leach v. Blow*, 8 Sim. & M. 221 (1847).

³ *Hypes v. Griffin*, 89 Ill. 134 (1878); *Conner v. Clark*, 12 Cal. 168 (1859). But see, *contra*, *Tutt v. Hobbs*, 17 Mo. 486 (1853), where the trustee in question was a public officer (school trustee). This ground for decision in his favor was, however, expressly disclaimed by the court.

⁴ *Hardy v. Pilcher*, 57 Miss. 18 (1879).

⁵ *Wolfe v. Jewett*, 10 La. 383 (1830).

⁶ *Condon v. Pearce*, 43 Md. 83 (1875).

⁷ *Lewis v. Brehme*, 33 Md. 432 (1870); *Castrique v. Buttigieg*, 10 Moo. P. C. 94 (1855). This case discusses at length the bearing of *Le Fevre v. Lloyd*, 5 Taunt. 749 and *Goupy v. Harden*, 7 *Ib.* 159, upon this question. But see, *Story on Agency* § 157.

it must always be remembered that where the intention has been to give credit personally to the agent who signs the bill or note, neither the payee's knowledge of his acting for a principal in the matter, nor the fact that the consideration went to the principal, will avail to exonerate the agent from individual liability.¹

§ 148. **Maker's or Drawer's Name Uncertain—Fictitious.**—There must be in a negotiable bill or note, as we have seen, no uncertainty as to the person to be bound by it as drawer or maker. It cannot be made in the alternative by either of two or more persons,² nor in the form of a promise by one "if my brother does not pay it within six weeks."³ Neither does a person who signs a fictitious name as maker to a note or bill render himself thereby liable as maker of the instrument, unless it be used by him with intention to bind himself or has been adopted by him as his name for business or other purposes. Except in such case the signer of such bill or note can only be held liable in a special action on the case.⁴ Where, however, a bill is signed with a fictitious name and made payable to the drawer's own order, an acceptance will be construed to bind the acceptor to pay upon the order of the person who actually drew the bill.⁵ In Germany a valid acceptance or indorsement may be based on a bill of exchange in the name of a fictitious drawer.⁶ In Denmark the use of fictitious names for either drawer or

¹ *Paterson v. Gandasequi*, 15 East 62. Of course there is no such intention to be inferred where the principal was not known at the time the contract was made and where the person contracting was not known to be acting for another, *Raymond v. Crown Mills*, 2 Metc. 324 (1841).

² *Ferris v. Bond*, 4 B. & Ald. 679. Here the note ran, "I, J. C., promise," &c., and was signed "J. C., or else H. B." This was held not to be a promissory note within the Statute of Anne.

³ *Appleby v. Biddulph*, Bul. N. P. 272; 4 Vin. Ab. 240 pl. 16.

⁴ *Bartlett v. Tucker*, 104 Mass. 336 (1870). The drawers of a bill of exchange using a fictitious name and obtaining a discount of such bill are liable on it as drawers, *Williamson v. Johnson*, 1 B. & C. 146 (1823). And the giving of a note by a purchaser of goods, Robert, in a wrong name, William, is no forgery, *Regina v. Martin*, L. R. 5 Q. B. D. 34 (1879); *Dunn's Case*, 1 Leach C. C. 59.

⁵ *Cooper v. Meyer*, 10 B. & C. 468.

⁶ Thöl W. R. 148.

drawee is prohibited under a penalty.¹ In France and Portugal, and in all countries governed by French law, while fictitious names are not absolutely prohibited their use destroys the commercial character of the paper and renders it a mere evidence of indebtedness.² This is also the case in some other foreign lands, where defense on that ground is prohibited to a party with notice at suit of a *bona fide* holder for value.³

§ 149. **Joint and Several Notes.**—A promissory note may be signed by several makers and in such case it will be either joint, or several, or joint and several. If no words are used to mark this distinction, it will be a joint note only.⁴ It is said, however, that if a note reading, "I promise," &c., is signed by several makers, it is both joint and several.⁵ And

¹Denmark (1825 Exch. Law § 3).

²Belgium (see France); France (1807 Code Napoleon Art. 112). The Code Napoleon governs also in Geneva, Greece, Hayti, Turkey and San Domingo. So, too, in Portugal (1833 Code Com. Art. 323).

³Argentine Republic (1862 Code Com. Art. 778); Brazil (1850 Code Com. Art. 354); Holland (1838 Exch. Law Art. 102); Italy (1865 Code Com. Art. 198).

⁴So far at least as to negative the idea of one maker being only surety, Johnson v. King, 20 Ala. 270 (1852).

⁵Byles 7; 1 Daniel 104; 2 Edwards § 967; Lane v. Salter, 4 Robt. 237 (1866); Hemmenway v. Stone, 7 Mass. 58 (1810); Chaffee v. Jones, 19 Pick. 263; Ely v. Clute, 19 Hun 35 (1879); Dill v. White, 52 Wis. 456 (1881); Maiden v. Webster, 30 Ind. 317 (1868); Groves v. Stephenson, 5 Blackf. 584 (1841); Lambert v. Lagow, 1 Ib. 388; Ladd v. Baker, 26 N. H. 76 (1852); Monson v. Drakeley, 40 Conn. 559 (1873); Barnet v. Skinner, 2 Bailey 88 (1831); Wallace v. Jewell, 21 Ohio St. 171 (1871), criticising Brownell v. Winnie, 29 N. Y. 409 (1864); First Nat. Bank v. Fowler, 36 Ohio St. 524 (1881); Partridge v. Colby, 19 Barb. 248 (1855); March v. Ward, Peake 130; Clerk v. Blackstock, Holt N. P. 474; Rees v. Abbot, Cowp. 832. So, too, in Keller v. McHuffman, 15 W. Va. 64 (1879), although a seal be added to one signature and the word "security" to the other. This is true also of a bond in the first person singular, signed by several, Sayer v. Chaytor, 1 Lutw. 695; Galway v. Matthew, 1 Campb. 403; S. C., 10 East 264; and of a warrant of attorney, Dalrymple v. Fraser, 2 C. B. 698; S. C., 15 L. J. C. P. 193; and of a covenant signed by two and sealed by only one of them, Van Alstyne v. Van Slyck, 10 Barb. 383 (1851). But it is said in Brownell v. Winnie, 29 N. Y. 409 (1864), that a note in this form "is still a several contract and is joint only for the purpose of the remedy upon it" But if a note reading, "I promise," &c., be signed "For A., B. & C., B," B. being one of a firm consisting of A., B. & C., B. is not separately liable on the note, *Ex parte* Buckley, 14 M. & W. 469 (1845), overruling Hall v. Smith, 1 B. & C. 407; S. C., 2 D. & R. 504, where a similar note was held to render the firm liable jointly and also the signer severally. See, too, Shipton v. Thornton, 9 Ad. & El. 314; S. C., 1 P. & D. 216, where a ruling similar to that in Hall v. Smith was made in the case of a contract for freight made in the first person singular but signed with the firm name.

this is true, except as between themselves, although one party sign as surety and add the word "surety" to the signature of his name.¹ Of the same force is a note signed by one maker only with a memorandum added by another, "I acknowledge myself holden as surety for the payment of the above note, Barnabas Adams."² On the other hand, a note running, "We or either of us promise," &c., would be plainly a joint and several note.³

It has been said that "a joint and several note, though on one piece of paper, comprises in reality and in legal effect several notes. Thus, if A., B. & C. join in making a joint and several promissory note, there are in effect four notes. There is the joint note of the three makers, and there are also the several notes of each of the three."⁴ This broad statement is judiciously and correctly qualified by Judge Sharswood to mean that *as to the remedy* such a note is either one joint note or three several notes, at the holder's election, and in no case four notes. *In other respects* (indorsement, demand, &c.) it is but one note.⁵ It would seem, therefore, more accurate to call such notes joint *or* several, since the holder may elect to sue any maker severally or all jointly, but cannot do

¹ *Dart v. Sherwood*, 7 Wis. 523 (1859); *Keller v. McHuffman*, 15 W. Va. 64 (1879). In like manner, if joint in form, the makers will be jointly liable to the holder, although "surety" is added to the names of some of them in the body of the note and they sign on the back of the paper, *Palmer v. Grant*, 4 Conn. 389 (1822), *Hosmer, C. J., dissenting*.

² *Hunt v. Adams*, 5 Mass. 358.

³ *Pogue v. Clark*, 25 Ill. 333 (1861). And in a declaration against all the makers such note may be described as a joint note. But on a note reading, "We or either of us promise * * * in behalf of School District No. 6," &c., and signed "A. B., Prest.; C. D., Secy.; E. F., Treas.," the individual signers were held not to be liable in *Harvey v. Irwine*, 11 Iowa 82 (1860), on the authority of *Haskins v. Edwards*, 1 *Ib.* 426; *Winter v. Hite*, 3 *Ib.* 142; *Lyon v. Adamson*, 7 *Ib.* 509; and *Baker v. Chambers*, 4 Gr. (Iowa) 428.

⁴ Byles 8, citing *Fletcher v. Dyte*, 2 T. R. 6; *Owen v. Wilkinson*, 28 L. J. C. B. 3; S. C. 5 C. B. (N. S.) 526; *Bulbeck v. Jones*, 5 Jur. (N. S.) 1317; *Beecham v. Smith*, El. Bl. & El. 442; and observations of Parke, B., in *King v. Hoare*, 13 M. & W. 505. If one maker of a joint and several note die, it still remains the joint and several note of the surviving makers, *Corlies v. Fleming*, 1 Vroom 349 (1863).

⁵ See Judge Sharswood's note, Byles 19. So, an alteration affecting the liability of one maker vitiates the entire instrument as to all, *Gardner v. Walsh*, 5 El. & Bl. 91.

both.¹ But this election of the holder is not binding upon the maker in his relation to his co-makers, and if he is sued as a several maker and obliged to pay the whole note, his right to sue his co-makers for contribution is unimpaired.²

Such a note may be valid as a joint note, although the several note be void.³ So, it may be complete as a several note and binding as such upon one who has signed it and put it into circulation, although it was intended to be a joint and several note and was put into circulation without the other signatures.⁴ If, on the other hand, a promissory note be issued by one person, but altered before its negotiation without his knowledge, by the addition of another signature as maker, it is said that this is not such a material alteration as will discharge him.⁵

Between such co-makers parol evidence is generally admissible to show their actual relation to one another.⁶ Thus, one joint maker may show, as against his co-makers, that he was only a surety for the others or one of them;⁷

¹ *Streatfield v. Halliday*, 2 T. R. 782. But see a suggestion to the contrary in 1 *Parsons* 251. In *Rees v. Abbot*, Cowp. 832, the note was to pay "jointly or severally," and it was held by Lord Mansfield that the person to elect whether it should be joint or several was the person to whom it was payable, and that "or" was synonymous in that case with "and."

² *Byles* 9.

³ *MacLae v. Sutherland*, 3 El. & Bl. 1.

⁴ *Dickerson v. Burke*, 25 Ga. 225 (1858).

⁵ *Brownell v. Winnie*, 29 N. Y. 400 (1864). But see, *contra*, *Hamilton v. Hooper*, 46 Iowa 515 (1877); *Lunt v. Silver*, 5 Mo. App. 186 (1878).

⁶ *Byles* 8; *Carpenter v. King*, 9 Metc. 515 (1845); *Branch Bank v. Coleman*, 20 Ala. 145 (1852). And this is true, although one of the several makers add to his name the word "security," which was held to be *prima facie* evidence of his bearing such character, *Robison v. Lyle*, 10 Barb. 512 (1851).

⁷ *Abbott's Trial Ev.* 445; 1 *Parsons* 233; *Hubbard v. Gurney*, 64 N. Y. 457 (1876). This case, in a very able opinion of Church, C. J., reviews the leading cases on the subject, and overrules *Campbell v. Tate*, 7 Lans. 370, and *Benjamin v. Arnold*, 5 Thomp. & C. 54. See, to the same effect, *King v. Baldwin*, 17 Johns. 384; *Archer v. Douglass*, 5 Denio 509; *Pain v. Packard*, 13 Johns. 173; *Bank of Steubenville v. Hoge*, 6 Ohio 17; *Davis v. Barrington*, 30 N. H. 517. "The object of the instrument is to show their relation to the creditor, and ordinarily it imports no more. The question of their relation to each other remains an open one; and hence the admission of parol evidence to answer it does not violate the rule by which such evidence is not allowed to vary the legal import of a written instrument," *Lowrie, J.*, in *Holt v. Bodey*, 18 Penna. St. 214 (1852). "The note," says Chief Justice *Parsons*, "is not a written contract between the makers,

but he cannot prove special conditions of suretyship, which are not implied in their legal relation and contradict the writing.¹ Parol evidence is also admissible against parties having knowledge of the relation of the makers to one another;²

although the language is *prima facie* evidence of their relations to each other; but it is a written contract between them and the payee," 1 Pars. N. & B. 233. And where A., B., C. and D. sign a joint and several note and C. and D. add "surety" to their names, B. may show by parol at suit of D. that he was only a surety for A., *McGee v. Prouty*, 9 Metc. 551 (1845). See, too, *Apgar v. Hiler*, 4 Zab. 812 (1854), where a note signed A., and below him B., C., "sureties," was held to import *prima facie* that B. and C. were joint sureties for A., but at suit of B., C. was allowed to show by parol that he was surety for A. and B., and not jointly with B. Originally this evidence was only admissible in equity, *Rees v. Berrington*, 2 Ves. 542. And such evidence appears to be regarded in England with disfavor notwithstanding the statute authorizing equitable defenses in actions at law, *Greenough v. McClelland*, 2 El. & El. 428. But see, *King v. Baldwin*, 17 Johns. 384, reversing 2 Johns. Ch. 554.

¹Abbott's Trial Ev. 445; *e. g.* an agreement on payee's part in the nature of a condition that he would not part with the note and would collect it promptly when due, *Thompson v. Hall*, 45 Barb. 214 (1866).

²Abbott's Trial Ev. 445; 1 Daniel 319; *Bailey v. Edwards*, 4 Best & Sm. 761 (1864); *Ervin v. Lancaster*, 6 Ib. 572 (1865); *Oriental Financial Corp. v. Overend*, L. R. 7 Ch. App. 152, affirmed L. R. 7 H. L. 348 (1874); *Smith v. Doak*, 3 Tex. 215 (1848); *Carpenter v. King*, 9 Metc. 516 (1845). *Shaw, C. J.*, saying in this case: "If it can be inquired into to adjust the relations of debtors to each other, it can be to determine the relation of the creditor to each debtor, where the fact becomes material to the respective rights." In this case the creditor had released the surety by discharging an execution against the principal. So, too, *Perry v. Hodnett*, 38 Ga. 104 (1868); *Rose v. Williams*, 5 Kans. 483 (1870). So, too, where the holder had also agreed to look to the principal, *Harris v. Brooks*, 21 Pick. 195 (1838). But see, *contra*, *Kritzer v. Mills*, 9 Cal. 21 (1858), where, however, the defense, that the holder had neglected to sue the principal in due time, was in itself unavailing. And it is not admissible against a *bona fide* holder without notice, *Orvis v. Newell*, 17 Conn. 103 (1845); nor against the payee of a bond having no notice, the maker being estopped from denying the character assumed by his signature, *Sprigg v. Bank of Mt. Pleasant*, 10 Pet. 264 (1836); *Pintard v. Davis*, 1 Zab. 632 (1846), affirming *Spencer* 205; nor against the payee of a note, no notice of the fact appearing to have been given him, *Bull v. Allen*, 19 Conn. 101 (1848); *Farrington v. Gallaway*, 10 Ohio 543 (1841), the proper remedy being said to be in equity; *Slipher v. Gooch*, 11 Ib. 299 (1842); nor even, it has been held, against a payee with notice, *Yates v. Donaldson*, 5 Md. 389 (1854); *Manley v. Boycot*, 18 E. L. & Eq. 357; *Perfect v. Musgrave*, 6 Price 111. But parol evidence has been held admissible in such case in favor of an accommodation acceptor at suit of a holder having no notice of the accommodation character of the acceptor and discharging him as a surety by giving the drawer further time for payment, *Bailey v. Edwards*, 4 Best & Sm. 761 (1864); and *a fortiori* at suit of a holder having such notice, *Ervin v. Lancaster*, 6 Best & Sm. 572 (1865). On the other hand, knowledge of the accommodation character of a joint maker is said to be no notice that he is a mere surety or entitled to the privileges of one, *Strong v. Foster*, 17 C. B. 201 (1855); and to like effect as to a maker for accommodation of indorser, see *Bank of Montgomery Co. v. Walker*, 9 Serg. & R. 229 (1823); *S. C.*, 12 Ib. 382; *White v. Hopkins*, 3 Watts & S. 99; *Lewis v. Hanchman*, 2 Penna. St. 416 (1845). Notice to a holder to subject him to such defense of suretyship, need not ante-date his becoming a party to the instrument,

but not against a *bona fide* holder for value without notice.¹

And except so far as may affect the rights of a surety, a joint note given for a joint liability will be presumed to be both joint and several.²

Oriental Financial Corp. v. Overend, L. R. 7 Ch. App. 152 (1871), affirmed L. R. 7 H. L. 360 (1874); *Oakeley v. Pasheller*, 10 Bligh 548; S. C., 4 Cl. & Fin. 207; *Swire v. Redman*, L. R. 1 Q. B. D. 542 (1876); *Greenough v. McClelland*, 2 El. & El. 424; S. C., 30 L. J. Q. B. 15; *Pooley v. Harradine*, 7 El. & Bl. 431; S. C., 26 L. J. Q. B. 156. But see, *Ex parte Graham*, 5 D. M. & G. 356. It is, however, necessary that the relation of the surety should have existed at that time, and subsequent change giving rise to such relation will not affect even a holder with notice, *Swire v. Redman*, L. R. 1 Q. B. D. 542 (1876). This case virtually overrules *Maingay v. Lewis*, Ir. R. 3 C. L. 495; in error, *Ib.* 229.

¹*Abbott's Trial Ev.* 445; *Byles* 8; *Price v. Edmunds*, 10 B. & C. 578; *Strong v. Foster*, 17 C. B. 201; *Manley v. Boycot*, 2 El. & Bl. 46 (1853); *Summerhill v. Tapp*, 52 Ala. 227 (1875); *Benedict v. Cox*, 52 Vt. 247 (1880); *Rice v. Cook*, 71 Me. 559 (1880); *Hughes v. Littlefield*, 18 *Ib.* 400. But see *Reynolds v. Wheeler*, 10 C. B. (N. S.) 561; S. C., 30 L. J. C. P. 351; *Hall v. Wilcox*, 1 M. & Rob. 58; *Fentum v. Pococke*, 5 Taunt. 192; S. C., 1 Marsh. 14; *Perfect v. Musgrave*, 6 Price 111.

²*Abbott's Trial Ev.* 399. "Where a note," says Strong, J., in *Yorks v. Peck*, 14 Barb. 647 (1853), "is made by two persons, which in terms is joint only, upon the death of one of the makers, the surviving maker only is liable upon it; unless it appears by direct proof, or the facts of the case warrant the inference that the parties intended it should be joint and several, 7 Bac. Abr., Bouvier's Ed., 249; Story's Eq. Jur. §§ 162 to 164; *Bradley v. Burwell*, 3 Denio 61; *Hunt v. Rousmanier*, 8 Wheat. 174; 1 Peters 1, 16; *Carpenter v. Provoost*, 2 Sandf. 537. If such an intention is expressly proved or may be inferred from the transaction, the note will be treated as if it was joint and several, and in that case the personal representatives of the deceased maker are liable for its payment, *same cases*. In all cases of a joint note given upon a joint loan of money or a joint liability of any kind, it will be presumed it was intended the note should be several as well as joint, and effect will be given to it according to that intention." Accordingly in the case cited (*Yorks v. Peck*) an action was sustained on a note joint in form against the surviving maker and the administrators of the deceased maker sued together.

II. THE PAYEE.

- 150. *Payee's Name*—Deceased Person—State.
- 151. *Payee*—Implied, not Named.
- 152. Designated, not Named.
- 153. Identical with Drawer or Drawee.
- 155. Joint—Alternative.
- 156. Agent, &c.—Personal Description.
- 157. "Agent," "Cashier," &c.—Principal Intended.
- 158. Executor—Public Officer—Trustee.
- 159. "Bearer"—Presumption as to Value.
- 160. "A. or Bearer"—"Or Holder"—"A. B., Bearer."
- 161. *Payee Fictitious*.
- 162. —Transfer—Forgery.
- 163. —Innocent Parties.
- 165. Payee Misnamed—Correction by Parol Evidence.
- 166. Name Common to Several Persons.
- 167. Blank Payee.
- 169. English and American Statutes.
- 170. Foreign Statutes.

§ 150. **Payee's Name—Deceased Person—State.**—It is also necessary that the payee should be designated with certainty.¹ The most usual and proper way of doing this is by naming the payee in the body of the instrument by his correct individual, partnership or corporate name. The payee is, however, often designated by the word "bearer," the effect of which will be considered hereafter. None but an existing firm, corporation or person can be the payee of a bill or note. Thus, commercial paper cannot be made payable to one who is dead. But if a note made to A. for his accommodation be renewed to him after his death and indorsed in that name by his widow, carrying on the business in his name, it will have all the force of an assumed name, and be binding on the indorser who uses it, at suit of a *bona fide* holder.²

¹ Byles 82; Chitty 179; 1 Daniel 109; 1 Edwards § 140; 1 Parsons 31; Story on Bills § 54; Story on Prom. Notes § 35; Gibson v. Minet, 1 H. Bl. 608; Yates v. Nash, 8 C. B. (N. S.) 581; Douglass v. Wilkeson, 6 Wend. 637 (1831); Brown v. Gilman, 13 Mass. 158 (1816); Evertson v. National Bank, 66 N. Y. 14 (1876); Mayo v. Chenoweth, 1 Ill. 200 (1826); Matthews v. Redwine, 23 Miss. 233 (1851); Prewitt v. Chapman, 6 Ala. 86 (1844); Smith v. Bridges, 1 Ill. 18 (1819). Thus, an order indorsed on a bill for goods to pay it "and charge to our account" has been held to amount to a bill of exchange, but not to be negotiable for want of a payee's name, Hoyt v. Lynch, 2 Sandf. 328 (1849).

² Van Etten v. Hemann, 35 Mich. 513 (1877). Such cases are provided for in Kentucky by the following statute: "A written obligation to a person or persons, who or some of whom happen to be dead at the time of its execu-

Again, where a bill has been indorsed by an agent to his principal residing abroad, in ignorance of his death, it has been held that his administrator may bring suit upon it, as if made to him.¹ And where one of the United States is named as payee, although not answering the description of an ordinary corporation, it is a good promissory note.²

If, on the other hand, no payee be designated, the instrument is not properly a bill of exchange or note, and cannot be sued on by the holder as bearer, although an action may lie on the original consideration between the parties to it.³ Thus, an interest warrant or coupon, detached from a corporation bond and designating no payee, is not a negotiable instrument.⁴ In Illinois, however, a due-bill in the simplest form, "Good for fifty cents," was treated as an instrument with the payee's name left blank, and the holder was allowed to add "to myself or order" and to sue on it as a valid note.⁵

§ 151. **Payee Named by Implication.**—Although the payee should properly be named in all commercial paper in the instrument itself, this is not absolutely necessary. Thus, an

tion, may be proceeded on by the representative of such person or by the survivor, as if it had been executed in the lifetime of such dead person or persons," 1881 G. S. Ky. 250 § 9.

¹*Murray v. East Ind. Co.*, 5 B. & Ald. 204 (1821), Abbott, C. J., saying: "We are of opinion that as the money, for which the bill was remitted, belonged to Hope's estate, it was competent to the administrator to elect to take the bill as the mode of payment, and that thereby the property did vest in him and he acquired a right to sue upon it." But an indorsement to a deceased person with an intent to effect a transfer to her personal representative, is void, *Valentine v. Holloman*, 63 N. C. 475 (1869).

²*State of Indiana v. Woram*, 6 Hill 33 (1843), where a State was held to be a corporation within the Statute of Anne as enacted in New York (1 R. S. 768 § 1).

³*Prewitt v. Chapman*, 6 Ala. 86 (1844). So held also of a due-bill without a payee, *Biskup v. Oberle*, 6 Mo. App. 583 (1878); and of a check, *McIntosh v. Lytle*, 26 Minn. 336 (1880).

⁴*Evertson v. National Bank*, 66 N. Y. 14 (1876); *Enthoven v. Hoyle*, 13 C. B. 394 (1853). But see, *contra*, *Smith v. County of Clark*, 54 Mo. 66 (1873); *McCoy v. Washington County*, 3 Wall. Jr. 381 (1862), if attached to the bond. "They partake," says Grier, J., p. 385, "of the nature of the peculiar instrument to which they are attached."

⁵*Weston v. Myers*, 33 Ill. 424 (1864). But see, *contra*, *Brown v. Gilman*, 13 Mass. 158 (1816), Parker, J., saying, p. 161: "It is not expedient to widen the field of negotiable paper. Certainly none can be considered as such, but that which has acquired the quality by statute, by usage, or by the terms of the contract; and this paper in the form in which it is now sued has not the sanction of either of these sources of authority."

order for payment at the bottom of a statement of account, the order naming no payee, implies payment to the creditor stating the account and is a bill of exchange.¹ So, too, an order for payment indorsed on a promissory note, in which the payee is named, payment to him being plainly intended by the order.² So, a new promise written under a note but naming no payee, is a promissory note to the payee named in the note above.³

In like manner a note, naming no payee, beginning with a receipt naming the person from whom the consideration proceeds, is a note payable to such person, *e. g.* "Received of A. B., £100, which I promise to pay on demand."⁴ But where a promisee is named, it will control the previous statement of indebtedness. Thus, the following instrument: "Due to the bearer £3, which I promise to pay to A. or order," is a note payable to A. or order and requires indorsement for its transfer.⁵

Negotiable paper generally contains words such as "order" or "bearer," referring to holders subsequent to, and deriving their title from, the original payee. The usual phrase in the former case is "Pay to A. B. or order." But the expression "Pay to the order of A. B.," although seeming not to name any immediate payee, is exactly equivalent to "A. B. or order."⁶ The original payee named, A. B., can sue upon it

¹ *Hoyt v. Lynch*, 2 Sandf. 328 (1849). But it is not sufficient to promise to pay "thirty-five dollars on a judgment in the hands of L. M. against M. S. in favor of J. C.," *Mayo v. Chenoweth*, 1 Ill. 200 (1826).

² *Leonard v. Mason*, 1 Wend. 522.

³ *Commonwealth Ins. Co. v. Whitney*, 1 Metc. 23 (1840). But an order by the payee indorsed on a note, drawn on the cashier of the bank where it is payable and naming no payee, is not a bill of exchange, *Douglass v. Wilkeson*, 6 Wend. 637 (1831).

⁴ *Byles* 83; *Chitty* 161, 179; 1 *Daniel* 112; 1 *Parsons* 31; *Story on Bills* § 55; *Pothier* pl. 31; *Ashby v. Ashby*, 3 Moo. & P. 186 (1829); *Chadwick v. Allen*, 1 Stra. 706; *Green v. Davies*, 4 B. & C. 235; 6 D. & R. 306 (1825); *Cummings v. Gassett*, 19 Vt. 308 (1847). As to the opinion of *Pardessus* to the contrary, see *Story on Bills* § 53.

⁵ *Cock v. Fellows*, 1 Johns. 143 (1806).

⁶ 1 *Daniel* 115; *Story on Bills* § 56; *Story on Prom. Notes* § 35; *Fisher v. Pomfret*, 12 Mod. 125; *Smith v. McClure*, 5 East 476; *Roby v. Phelon*, 118 Mass. 541 (1875); *Howard v. Palmer*, 64 Me. 86 (1874); *Durgin v. Bartol*, 16. 473; *Sherman v. Goble*, 4 Conn. 246 (1822); and an averment that it was made payable "to his order," is sufficient, *Ib.*

without indorsing it,¹ but a purchaser from him can only sue after indorsement by him.²

§ 152. **Payee Designated, not Named.**—But it is not necessary, as has been said, that the payee be named, if he is otherwise plainly ascertained and identified.³ This may be done sufficiently even by an “I. O. U.,” and parol evidence is in such case admissible to show the person intended.⁴ So, a note may be made payable to “the manager of the National Provincial Bank;”⁵ or “the treasurer of the First Parish of A. ;”⁶ but not “to the secretary for the time being” of a designated company.⁷ Notwithstanding this, a note to A. and B., “stewardesses for the time being of the P. D. Society,” naming them, will sustain an indictment for forgery, although the society was not legally enrolled and A. and B. were not legally stewardesses.⁸ So, in a note payable to “the Steam-

¹ *Huling v. Hugg*, 1 Watts & S. 418 (1841).

² *Durgin v. Bartol*, 64 Me. 473 (1874); *Smalley v. Wight*, 44 Me. 442 (1857). But when indorsed and delivered, it has the same force as any other note, *Hall v. Burton*, 29 Ill. 321 (1862).

³ *Bytes* 82; 1 *Parsons* 31; *Story on Bills* § 55; *Storm v. Stirling*, 3 El. & Bl. 832; *Cowie v. Stirling*, *Id.* 333; *Bacon v. Fitch*, 1 Root 181 (1790); *Adams v. King*, 16 Ill. 167 (1854).

⁴ *Kinney v. Flynn*, 2 R. I. 329 (1852). See, too, *Curtis v. Rickards*, 1 Man. & G. 46 (1840).

⁵ *Robertson v. Sheward*, 1 Man. & G. 511; 1 *Scott N. R.* 419 (1840).

⁶ *Buck v. Merrick*, 8 Allen 123 (1864). See, too, *Alston v. Heartman*, 2 Ala. 699 (1841).

⁷ *Yates v. Nash*, 8 C. B. (n. s.) 581 (1860); *Storm v. Stirling*, 3 El. & Bl. 832, affirmed as *Cowie v. Stirling*, 6 El. & Bl. 333 (1856). Lord Campbell, C. J., said in this case: “The use of the words ‘for the time being,’ in the first instance, the repetition of them afterwards, and the whole form and scope of the instrument satisfy us that the payment was to be made to the individual who at the time of the instrument falling due should fill the situation of secretary of the company, and not to the plaintiff, unless he happen to be the secretary at that time. It was, we think, clearly intended as a floating promise, the performance of which was to be made to the person being secretary when the document became due. The other construction would in effect be to hold that the words ‘the secretary for the time being’ meant the *now* secretary; but we think that the words were used for the very purpose of excluding that construction. * * * The defect is that it is a promise to pay some person to be ascertained *ex post facto*.”

⁸ *Rex v. Box*, 6 Taunt. 325 (1815), *Le Blanc, J.*, saying: “Though these ladies were not at the time legally stewardesses, yet it was a description by which they were known at the time; and though they could not legally have successors in office, yet, in case of their decease, their executors and administrators might sue and they themselves during their life might recover on it.”

boat Juda and owners or order," the owners are sufficiently designated as payees.¹ It is also sufficient if a note be made payable to the "heirs of A.;"² although A. be then living, his heirs apparent being the persons intended in such case.³ So, it is sufficient, if a note be payable to "A. or heirs;"⁴ or to "the administrator of A.;"⁵ or "the guardian of A.;"⁶ or "the trustees acting under A.'s will."⁷ But it is not sufficient to make a note payable to "A. or B., administrators of C.;"⁸ or to "the heirs, administrators or assigns of A., deceased;"⁹ or to "the estate of M. L., deceased."¹⁰

§ 153. **Payee Identical with Drawer or Drawee.**—A bill of exchange may be made payable to the order of the person on whom it is drawn, although this is unusual.¹¹ So, a negotiable promissory note may be payable to the maker's own order.¹² And when made so payable and indorsed in blank by the maker, it is equivalent to a note payable to

¹Moore v. Anderson, 8 Ind. 18 (1856).

²Bacon v. Fitch, 1 Root 181 (1790).

³Lockwood v. Jesup, 9 Conn. 272 (1832); Cox v. Beltzhoover, 11 Mo. 142 (1847).

⁴Knight v. Jones, 21 Mich. 161 (1870).

⁵Adams v. King, 16 Ill. 109 (1854); Moody v. Threlkeld, 13 Ga. 55 (1853).

⁶Hemphill v. Hamilton, 11 Ark. 425; Bingham v. Calvert, 13 Ib. 399 (1853); Chitwood v. Cromwell, 12 Heisk. 658 (1874). Such a note is the legal property of the guardian and can be sued by his executor, *Ib.*

⁷Meggison v. Harper, Tyrw. 96; 2 Crompt. & M. 322.

⁸Musselman v. Oakes, 19 Ill. 81 (1857).

⁹Bennington v. Dinsmore, 2 Gill 348 (1844).

¹⁰Lyon v. Marshall, 11 Barb. 241 (1851); Tittle v. Thomas, 30 Miss. 122 (1855). And it may be regarded as a mere statement of account, Bowles v. Lambert, 54 Ill. 237 (1870). But such an instrument is a written contract and evidence of debt between the maker and the executor of the estate, Hendricks v. Thornton, 45 Ala. 309 (1871). And see, Peltier v. Babillion, 45 Mich. 384 (1881), where such instrument was held to be a valid note payable to the legal representative.

¹¹Chitty 33; Holdsworth v. Hunter, 10 B. & C. 449 (1830); Wildes v. Savage, 1 Story C. C. 29 (1839). And a bill may be payable "to the order of the acceptor," Witte v. Williams, 8 So. Car. 290 (1876). But it has been held that an order on A. B. to pay to his own order, accepted, but not indorsed, by him, lays the acceptor under no obligation to a third party, and is not a bill of exchange, for forging or uttering which an indictment will lie, Regina v. Bartlett, 2 Mood. & Rob. 362 (1841). See, too, Story on Bills § 35, and comments on it in Wildes v. Savage, *supra*.

¹²Miller v. Weeks, 22 Penna. St. 89 (1853).

bearer.¹ And the maker then becomes liable both as maker and as indorser.² Such a note is, however, incomplete and of no binding force, until it has been indorsed by the maker.³ In like manner a note payable "to our and each of our order," when indorsed, falls within the Statute of Anne.⁴ In New York, however, by force of the Revised Statutes, where a note payable to the maker's order is transferred by him for value without indorsement, he is liable on it to a *bona fide* holder as on a note payable to bearer.⁵ While, in Kentucky, a note to the maker's order indorsed in blank by him is not negotiable.⁶

¹Masters v. Baretto, 8 C. B. 433 (1849); Wilder v. De Wolf, 24 Ill. 190 (1860); Roberts v. Lane, 64 Me. 108 (1874); Bishop v. Rowe, 71 Ib. 263 (1880). See, too, Gay v. Lander, 17 L. J. C. P. 286; Brown v. De Winton, 6 C. B. 336 (1848). And when such note indorsed in blank by the maker comes into the hands of a *bona fide* holder for value before maturity, it will not be subject to defense by reason of equities between the original parties, Roberts v. Lane, *supra*. But it has been held that a note payable to the maker or bearer can only be sued in equity, Keith v. Keith, 11 Rich. Eq. 83 (1859); Glenn v. Caldwell, 4 Ib. 168 (1851).

²Hall v. Burton, 29 Ill. 321 (1862).

³Brown v. De Winton, 6 C. B. 336 (1848); Wood v. Mytton, 10 Q. B. 805 (1847), overruling Flight v. Maclean, 16 M. & W. 51 (1846), so far as it conflicts; Roby v. Phelon, 118 Mass. 541 (1875); Little v. Rogers, 1 Metc. 108 (1840); Kayser v. Hall, 85 Ill. 513 (1877); Pickering v. Cording, 92 Ind. 306 (1883); Scull v. Edwards, 13 Ark. 24 (1852), the first indorsee being in such case in reality the payee. But a note reading, "I promise to pay to the order of myself," signed by A. and B. and placed in B.'s hands to be negotiated for his sole benefit, is virtually a joint and several note payable "to the order of ourselves or either of us," and binds A. although negotiated by the indorsement of B. only, First Nat. Bank v. Fowler, 36 Ohio St. 524 (1881).

⁴Absolon v. Marks, 11 Q. B. 19 (1847); S. C., 11 Jur. 1016; S. C., 17 L. J. Q. B. 7.

⁵Central Bank v. Lang, 1 Bosw. 202 (1857); Plets v. Johnson, 3 Hill 115 (1842). The New York statute provides as follows: "Such notes, made payable to the order of the maker thereof or to the order of a fictitious person, shall, if negotiated by the maker, have the same effect and be of the same validity as against the maker, as if payable to bearer," 1 R. S. 768 § 5. There is a similar statute in California (Civ. Code 1872 §§ 8101, 8102), Dakota (Rev. Code 1877 §§ 1832, 1833), Idaho (Rev. L. 1875 p. 652 § 5), Michigan (1 Comp. L. 1871 p. 515 § 4), Minnesota (1878 G. S. c. 23 § 16), Missouri (1 R. S. 1879 c. 10 § 549), Nevada (1 Comp. L. 1873 c. 5 § 9), Oregon (1872 G. L. c. 48 §§ 1, 4) and Wisconsin (1878 R. S. § 1679). And the accommodation indorser of such a note, with knowledge of the facts, is liable as on a note payable to bearer, Irving Nat. Bank v. Alley, 79 N. Y. 536 (1880), Earl, J., saying that the facts of which the defendant must have knowledge are "simply that the note is payable to the order of the maker or of a fictitious person."

⁶Muhling v. Sattler, 3 Metc. 285 (Ky. 1860). This was changed by statute in 1866 (Myers' Supp. 741), so that the blank indorsement may now be filled and sued upon as a fresh promise, Pace v. Welmending, 12 Bush 141 (1876); or the holder may sue without filling the blank indorsement, *Ib.* "When-

It frequently occurs that a note or bill is drawn by, or payable to, several persons. In such case, if the same person be both maker and payee, he cannot sue on the note, but it remains good as a note to his co-payees, *e. g.* C. could sue on a note made by A. and B. to B. and C.¹ So, if A., B. & C. make a joint and several note to B. and C., the payees can sue A. on his several obligation.² But if the note be a joint one by a firm to one of its partners, no suit can be brought on it by him. An assignee or indorsee can sue on it, however.³ In like manner a joint partnership note by one firm to another firm, having one partner in common, cannot be sued by the payees, but their assignee or indorsee can sue.⁴

§ 154. The identity of the maker and payee may, indeed, be more apparent than real; as where a payee intending to indorse the note for the purpose of transfer and guaranty, inadvertently signs his name on the face of the note, under

ever a promissory note is made by the obligor payable to himself or to his order, and is signed on the back thereof by the said obligor and then delivered, such signature and delivery shall operate as a promise to pay the face of the note at maturity to the party to whom the same shall have been delivered, and such party may fill up the blank with words of promise and recover thereon in the same manner as if such party had been named as payee in the note and such note shall be assignable as are other promissory notes," 1881 G. S. Ky. 251 § 13; Myers' Supp. 1866 p. 741 § 1.

¹Quisenbury v. Artis, 1 Duv. 30 (1863). But a note by A. and B. to B. cannot be sued either by B. or by his personal representatives, Glenn v. Sims, 1 Rich. 34 (1844); although it may be sued by B.'s indorsee, Woods v. Riley, 11 Humph. 194 (1850); Muldrow v. Caldwell, 7 Mo. 563 (1842); Smith v. Gregory, 75 Ib. 121 (1881).

²Beecham v. Smith, El. Bl. & El. 442 (1858). If, however, a note be made by A. and B. payable to "A. or bearer," it has been held in South Carolina that a subsequent holder or "bearer" may sue both makers, Devore v. Mundy, 4 Strobb. 15 (1849).

³Smith v. Lusher, 5 Cow. 688 (1825); Pitcher v. Barrows, 17 Pick. 361 (1835); Davis v. Briggs, 39 Me. 304; Hapgood v. Watson, 65 Me. 510 (1876); Woodman v. Boothby, 66 Ib. 389 (1876); Young v. Chew, 9 Mo. App. 387 (1880); Walker v. Wait, 50 Vt. 668 (1878); Ormsbee v. Kidder, 48 Ib. 361 (1875); Norton v. Downer, 15 Ib. 569; Heywood v. Wingate, 14 N. H. 73 (1843); Tucker v. Bradley, 33 Vt. 324 (1860). So, too, one partner cannot sue his firm on a joint partnership acceptance of a bill of exchange held by him, Neale v. Turton, 4 Bing. 149 (1827). And to the effect that on a non-negotiable note made by a firm to one of its partners, the makers cannot be sued by the indorsee, see Hill v. McPherson, 15 Mo. 130.

⁴Murdock v. Caruthers, 21 Ala. 785 (1852). And the fact of there being such common partner, is not such notice of a fraud on either firm as to affect the *bona fide* character of an indorsee to whom such fact was known, Stimson v. Whitney, 130 Mass. 591 (1881).

the maker's signature. Such inadvertence will not render the note void, as if payable to the maker.¹ The payee may, moreover, be a different person of the same name as the maker, and this has even been held to be the case *prima facie*, where the name is the same.² As to such notes payable to the order of the maker, it has been held also that this fact constitutes no ground of suspicion which can cast a shadow on the *bona fide* character of the holder's title.³ And the indorsement of the maker's name on such a note constitutes a forgery, as completely as the signature on the face might do.⁴

In the same manner a bill of exchange may be made payable to the order of the drawer, and the principles herein stated as to notes payable to the maker's order apply in general to such bills.⁵ A bill drawn in this way may be treated at the option of the holder as a promissory note,⁶ or an accepted bill.⁷ Of the same character are bills drawn by an agent or officer of a corporation on another officer, or on the corporation itself.⁸ But a bill drawn payable to the drawer's

¹Cason v. Wallace, 4 Bush 388 (1868).

²Cooper v. Poston, 1 Duv. 92 (1863).

³Roberts v. Lane, 64 Me. 108 (1874).

⁴Commonwealth v. Dallinger, 118 Mass. 439 (1875).

⁵Bytes 90; Chitty 32, 182; Story on Bills § 35; Butler v. Crips, 1 Salk. 130 (1704); Randolph v. Parish, 9 Porter 76 (1839); Rice v. Hogan, 8 Dana 133 (1839); Hasey v. White Pigeon B. S. Co., 1 Dougl. 193 (Mich. 1843); Kaskaskia Bridge Co. v. Shannon, 6 Ill. 15 (1844). So, an instrument in the form of a bill payable to drawer's order and indorsed in blank by him, and not accepted, or accepted merely by the drawee's name written across the face of the bill, may be declared on as a promissory note of the drawer indorsed by the drawee, Armfield v. Allport, 27 L. J. Exch. 42 (1857).

⁶Bytes 90; Chitty 33; Story on Bills §§ 35, 58; Roach v. Ostler, 1 M. & Ry. 120; Dickinson v. Valpy, 10 B. & C. 128; 5 M. & R. 126; Butler v. Crips, 1 Salk. 130; Block v. Bell, 1 M. & Rob. 149; Starke v. Cheesman, Carth. 509; Dehors v. Harriot, 1 Show. 163; Robinson v. Bland, 2 Burr. 1077; Davis v. Clarke, 6 Q. B. 16; Randolph v. Parish, 9 Porter 76 (1839); Planters' Bank v. Evans, 36 Tex. 592 (1872); Wardens v. Moore, 1 Ind. 289.

⁷Cunningham v. Wardwell, 12 Me. 466 (1835).

⁸Fairchild v. Ogdensburgh R. R. Co., 15 N. Y. 337 (1857); Hasey v. White Pigeon B. S. Co., 1 Dougl. 193 (Mich. 1843); Dennis v. Table Mtn. Water Co., 10 Cal. 369 (1858); Marion R. R. Co. v. Dillon, 7 Ind. 404; Marion R. R. Co. v. Hodge, 9 Ib. 163 (1857); Hazard v. Cole, 1 Idaho 276 (1869); Taylor v. Newman, 77 Mo. 257 (1883). But see, Wetumpka, &c., R. R. Co. v. Bingham, 5 Ala. 657 (1843), where such instrument, it was held, should be declared on as a bill of exchange with usual averments of presentment for payment and dishonor.

own order does not depend on the indorsement for its existence, but if accepted and not indorsed, it is a bill payable to the drawer,¹ on which he may hold the acceptor, giving him notice that he holds the bill as payee.²

§ 155. **Payees—Joint—Alternative.**—A note or bill may be payable to several persons jointly, using either their individual names or a firm name. In the former case such note can only be transferred by indorsement of all the payees.³ And neither payee can, of course, indorse the names of the others without special authority.⁴ The authority of an individual partner to indorse commercial paper payable to his firm forms an exception to the ordinary rule. But if the firm transacts business in the individual name of one partner and a note is made payable to such name, it will be *prima facie* the individual property of that partner.⁵ When a note is made payable half to one person and half to another, it is still a joint note on which they may have a joint action.⁶

On the other hand, commercial paper cannot be payable in the alternative to one or more of several payees. Thus, it is not sufficient for a note to be made payable to A. or B.;⁷

¹Chitty 182; *Smith v. McClure*, 5 East 476; *Huling v. Hugg*, 1 Watts & S. 418 (1841).

²*Rice v. Hogan*, 8 Dana 133 (1839).

³*Wood v. Wood*, 1 Harr. 428 (N. J. 1838). So, too, *Ryhiner v. Feickert*, 92 Ill. 305 (1879), although payment at maturity to either would have been sufficient. The survivor may, however, transfer or bring suit on it, *Allen v. Tate*, 58 Miss. 585 (1881); *Draper v. Jackson*, 16 Mass. 480 (1820). But where the payees were man and wife, and the husband, dying first, made provisions for the wife in lieu of the note, and such provision was recognized and accepted by her, the note was held to belong to the estate of the deceased husband, *Sanford v. Sanford*, 45 N. Y. 723 (1871).

⁴*Wood v. Wood*, 1 Harr. 428 (N. J. 1838).

⁵*Boyle v. Skinner*, 19 Mo. 82 (1853).

⁶*Flint v. Flint*, 6 Allen 34 (1863).

⁷*Byles* 90; *Chitty* 179; 1 *Edwards* § 135; 1 *Parsons* 33; *Story on Bills* § 55; *Blanckenhagen v. Blundell*, 2 B. & Ald. 417; *Osgood v. Pearson*, 4 Gray 455 (1855); *Carpenter v. Farnsworth*, 106 Mass. 561 (1871); *Walrad v. Petrie*, 4 Wend. 575 (1830). But such note is sufficient evidence of a joint contract to support an action by both, *Westgate v. Healy*, 4 R. I. 523 (1857). And see, *Spaulding v. Evans*, 2 McLean 139 (1840), where a note made in Illinois to A., B., or C., was held to be actionable by either of them. While in *Willoughby v. Willoughby*, 5 N. H. 244 (1830), such note was held to be joint and only actionable in a joint suit by A. and B.

or to "A. or B., administrators of C."¹ In a recent case, however, in North Carolina a note payable to "Squire P. or Thomas Parkin," was construed to be payable to both, "or" being construed as "and."² So, a note to "A. B. or heirs," has been held sufficient.³ Likewise a note to "A. B. or C. B. his wife," they being in contemplation of law one person, and the note being equivalent to one made to the husband alone.⁴ And a note may be made to the "trustees of the Methodist Church or their collector," it being the intention to designate by this means an agent of the payee to whom the payment may be made.⁵ So, too, a note may be made to A., B. and C., "or their order, or the major part of them," and will support a joint action by all.⁶

Even where a note to "A. or B." is not properly a promissory note, an action will lie for the value paid for it and shown by it.⁷ It has been held that in such case A. and B. are joint owners and must join in a transfer of it.⁸ Al-

¹ *Musselman v. Oakes*, 19 Ill. 81 (1857).

² *Parker v. Carson*, 64 N. C. 563 (1870).

³ *Knight v. Jones*, 21 Mich. 161 (1870).

⁴ *Young v. Ward*, 21 Ill. 223 (1859). After the husband's death such a note may be transferred by the wife alone, *Prindle v. Caruthers*, 15 N. Y. 425 (1857). And where such a note was indorsed after the husband's death with the name of the maker and the date of indorsement, it was held that no new promise was intended but that the memorandum took the subsisting note out of the statute of limitations, *Bourdin v. Greenwood*, L. R. 13 Eq. 281 (1871).

⁵ *Noxon v. Smith*, 9 Cent. L. J. 436; S. C., 127 Mass. 485 (1879). In the language of Cockburn, C. J., in *Holmes v. Jaques*, L. R. 1 Q. B. 376 (1866), in deciding to same effect upon a note payable "to the trustees of the Wesleyan Chapel or their treasurer for the time being": "all this instrument shows is that it is payable in the first instance to the trustees, as payees, but with the option of the maker to pay to the treasurer for the time being as their agent. The treasurer would have no authority to sue in his own name but only to receive the money on behalf of the trustees. I think it would be to introduce unnecessary strictness if we were to say that this was not a valid promissory note; and by holding that the treasurer for the time being is simply inserted as an indication that he, as the agent of the trustees, is authorized to receive payment on their behalf, no uncertainty is introduced into the instrument." So, too, *Gaytes v. Hibbard*, 5 Biss. C. C. 100 (1869).

⁶ *Watson v. Evans*, 32 L. J. Exch. 137; 1 H. & Colt. 662 (1863).

⁷ *Walrad v. Petrie*, 4 Wend. 575 (1830).

⁸ *Quimby v. Merritt*, 11 Humph. 440 (1850), disapproving *Ellis v. Mc-Lemmoor*, 1 Bailey 13. But it has been held in Texas that a written contract to pay to either of two persons may be assigned by or paid to either of them, *Record v. Chisum*, 25 Tex. 348 (1860).

though other cases hold that either may sue upon such an instrument.¹ And where a note was made to A., B., C. or D., it was held to be several as to all and not joint as to A., B. and C., and A., B. and C. were not allowed to recover in a joint action by them, although it was said that they might have sued separately.² Moreover, a note may be payable to one of two payees in an alternative expressed by a condition, although in such case the condition destroys the negotiability of the note. If a note is made payable in this manner to A., "if she called for it before she died," and if not, to B., it is payable after A.'s death to B. and not to the representatives of A.³

§ 156. **Payee's Name—Agent, &c.—Personal Description.**—The general rule that only those parties shall be holden on a bill or note, who are plainly designated by name or description in the instrument, is in its principle applicable to the payee's name also, in determining questions of ownership and right to sue. That is to say, in general, only the payee or indorsee designated in the instrument can sue upon it and not any third party, although it may have been given for his benefit. Thus, an agent purchasing a bill of exchange for his principal, but making it payable to, and indorsing it with, his individual name only, is, as we have seen, personally responsible.⁴ But where a note for goods sold by an agent is made payable to him individually, the principal is at least so far identified with him as to preclude him from claiming to hold as a *bona fide* purchaser for value clear of equities existing between the original parties.⁵ *Prima facie* a note or bill is the property only of the payee designated in it, and only he can sue as such payee. This is true even of a note made to a married woman for a loan of money by

¹Ellis v. McLemoor, 1 Bailey 13 (1828); Spaulding v. Evans, 2 McLean 139 (1840).

²Samuels v. Evans, 1 McLean 475 (1839). But where a note was made to "A., B., and C., or the major part of them," all three can bring a joint action on it, Watson v. Evans, 32 L. J. Exch. 137; S. C., 1 H. & Colt. 662 (1863).

³Blanchard v. Sheldon, 43 Vt. 512 (1871).

⁴Austin v. Roberts, 2 Miles 254 (1838).

⁵Neil v. Cummings, 75 Ill. 170 (1874).

her husband.¹ It has, however, been held that a note, made payable to A., and sued upon by B. without indorsement, might be shown by parol evidence to have been made to A. as B.'s representative.² And where a note was made by A. to C. for B.'s debt to C., and not accepted or credited by C., it was held that B. was *prima facie* C.'s agent in the matter and might sue on the note in C.'s name.³

If a note is made to "A. B., agent," it has been held that his principal may sue on it in his own name.⁴ But the suffix may be treated as a mere description and the note sued on by the agent as his individual property.⁵ So, too, a draft to "A. B., treasurer," will be treated as payable to A. B. and not to the treasurer for the time being.⁶ So, a note to "A. B., president," for a firm doing business as the People's Bank, may be sued on by A. B. without joining his partners.⁷ And even where the principal is named in designating the agent named as payee, the agent may sue in his own name, *e. g.* a note payable to "A. B., agent of the P. H. Co.;"⁸ or to "A. B., treasurer of the R. & A. R. R.;"⁹ or to "A. B., superintendent of the Decatur Agricultural Works;"¹⁰ or to

¹Tooke *v.* Newman, 75 Ill. 215 (1874).

²Jacobs *v.* Benson, 39 Me. 132 (1855). And in case of a factor's bankruptcy, a note for money due the principal taken in the factor's name, belongs to the principal and not to the creditors of the factor, *Messier v. Amery*, 1 Yeates 533 (1795).

³Overman *v.* Grier, 70 N. C. 693 (1874).

⁴National Life Ins. Co. *v.* Allen, 116 Mass. 398 (1874). So, in general, of an undisclosed principal, *Taunton Turnpike v. Whiting*, 10 Mass. 327 (1813). So, a note payable to "C. B. M., agent," may be transferred by the principal's indorsement, "Granite Agricultural Works, C. B. M., agent," *Farming-ton Savings Bank v. Fall*, 71 Me. 49 (1879). And a note payable to "A. B., agent, his assignees or order," cannot be sued by his assignees in their own name in North Carolina, *Grist v. Backhouse*, 4 Dev. & B. 362 (1839).

⁵Toledo Agricultural Works *v.* Heisser, 51 Mo. 128 (1872). So, too, in a replevin suit for a bond made payable to A. as agent for B., *Douglas v. Wolf*, 6 Kans. 88 (1878).

⁶Shaw *v.* Stone, 1 Cush. 228 (1848). But a note made to and indorsed by "R. B., treasurer," was held, in New York, to be payable to the corporation and transferred by it, *Babcock v. Beman*, 11 N. Y. 200. See, too, *McBroom v. Lebanon*, 81 Ind. 208 (1869).

⁷Wolcott *v.* Standley, 62 Ind. 198. See, too, *Van Ness v. Forrest*, 8 Cranch 30 (1814).

⁸Buffum *v.* Chadwick, 8 Mass. 103 (1811).

⁹Chadsey *v.* McCreery, 27 Ill. 253 (1862).

¹⁰Durfee *v.* Morris, 49 Mo. 55 (1871).

"A. B., lawful attorney for C. D."¹ This has been held also in the case of a note to "A. B., agent of the proprietors of the town of C.," although they appear to have been clothed with a *quasi*-public character.² And where a note was made payable to "A. B., permanent secretary of the Adelphi Lodge," it was held that he might bring suit in his own name, by authority of the members of the lodge, after he had ceased to be secretary.³

§ 157. "Agent," "Cashier," &c.—Principal Intended.—We have seen that a note payable to "A. B., agent," may be treated and sued upon as the property of the principal. And this is true *a fortiori* of a note payable to "A. B., agent of C. D."⁴ So, too, of a note made payable to "A. B., agent of the E. Ins. Co.," in consideration of a policy of insurance issued by the company.⁵ So, of a note to "A. B., president of the E. R. R.;"⁶ or "G. W., treasurer of the I. M. Co."⁷

And where a note is made to an officer so designated "or his successors in office," it is still more plainly the property of the corporation;⁸ especially in the case of a public municipal corporation.⁹ And it seems that such municipal-

¹ *Austell v. Rice*, 5 Ga. 472 (1848).

² *Bryant v. Durkee*, 9 Mo. 168 (1855). As to notes to public officers, see *infra*.

³ *Whitcomb v. Smart*, 38 Me. 264 (1854).

⁴ *Bean v. Dolliff*, 67 Me. 228 (1877). But if made "to A. B., for the use of C. D.," the latter has only an equitable interest and can neither transfer the instrument nor sue upon it at common law in his own name, *Evans v. Cramlington*, Carth. 5; *Cramlington v. Evans*, 2 Vent. 307, affirming; or to "A. B., agent for C. D.," *Clark v. Reed*, 12 Sm. & M. 554 (1849).

⁵ *Black v. Enterprise Ins. Co.*, 33 Ind. 223 (1870).

⁶ *Eastern R. R. Co. v. Benedict*, 5 Gray 561 (1856). So, too, though his official character as president be only designated by initial letters, *Dupont v. Mount Pleasant Ferry Co.*, 9 Rich. 255 (1856). And parol evidence is admissible to show that the corporation was intended, *Lovejoy v. Citizens' Bank*, 23 Kans. 331 (1880).

⁷ *Trustees v. Parks*, 10 Me. 441 (1833); *Vater v. Lewis*, 36 Ind. 288 (1871); *McBroom v. Lebanon*, 31 *Ib.* 268 (1869); *Rutland, &c., R. R. Co. v. Cole*, 24 Vt. 33 (1851). But see, *contra*, as to a note made payable to "A. B., supt. of the D. A. Works," *Durfee v. Morris*, 49 Mo. 55 (1871).

⁸ *Trustees v. Park*, *supra*; *Tainter v. Winter*, 53 *Ib.* 348 (1865), and suit may be brought by the successor in office; *Packard v. Nye*, 2 Metc. 47 (1840); *Fisher v. Ellis*, 3 Pick. 321 (1825).

⁹ *Town of Arlington v. Hinds*, 1 D. Chip. 431 (1824); *Garland v. Reynolds*, 20 Me. 45 (1841).

ity may sue on the note in the name of the payee's official successor.¹ Where, however, a promissory note was made to "A., B. and C., trustees of the Apalachicola Land Company (a voluntary association) or their successors in office or order," it was held that these words might be treated as mere description and suit brought on the note by the survivors, A. and B., although their term of office had expired and their successors had been appointed.²

If the payee be designated by his official title only and not named, the corporation represented is with equal reason the owner of the note and may bring suit upon it. This has been held in case of a note, payable to "the commissioners of the V. C. R. R.;"³ and of a note payable to "the treasurer of the M. L. Inst.;"⁴ and of a note to "the Branch of the Bank of the State of Arkansas."⁵

The office of *cashier* and the cashier's official name have, by constant usage of the banks in the making and transfer of commercial paper, become synonymous with the bank itself. Such paper payable to the cashier of a designated bank or his order may be held and sued by the bank without indorsement.⁶ And it is not necessary that the bank be named in the instrument, but like effect will be given to a bill or note payable to "A. B., cashier;"⁷ or to "A. B., cas.,"

¹Fisher v. Ellis, 3 Pick. 322 (1825). But it has been held that such successor cannot bring suit on it in his own name, Upton v. Starr, 3 Ind. 508 (1852).

²Davis v. Garr, 6 N. Y. 124 (1851). But in Sayers v. First Nat. Bank, 89 Ind. 230 (1883), it was held that the title was vested in the corporation, and an indorsement "Trustees of Indiana University, by A. B., treasurer," passed the title *prima facie*.

³Vermont Central R. R. Co. v. Clayes, 21 Vt. 30 (1848).

⁴Alston v. Heartman, 2 Ala. 699 (1841); Nichols v. Frothingham, 45 Me. 220 (1858); Vater v. Lewis, 36 Ind. 288 (1871). These cases go further and hold that the suit *must* be brought by the corporation.

⁵State Bank v. Jenkins, 7 Ark. 389 (1846); Bower v. State Bank, 5 Ib. 234.

⁶Commercial Bank v. French, 21 Pick. 486 (1839); Nave v. First Nat. Bank, 87 Ind. 204 (1882). And the cashier may bring an action in his own name on such paper, Porter v. Nekervis, 4 Rand. 359 (1826). Or the suit may be in the name of his successor, Dutch v. Boyd, 81 Ind. 146 (1881).

⁷Commercial Bank v. French, 21 Pick. 486 (1839); Stamford Bank v. Ferris, 17 Conn. 259 (1845); Haynes v. Beckman, 6 La. An. 224 (1851); First Nat. Bank v. Hall, 44 N. Y. 395 (1871); Lacy v. Central Nat. Bank, 4 Nev. 179 (1875); Bank of State of New York v. Muskingum Branch, 29 N. Y.

parol evidence being admitted to show "cashier" intended.¹ In all such cases parol evidence is admissible, if necessary, to show the bank intended as payee.²

§ 158. **Payee's Name—Executor—Public Officer—Trustee.**—In like manner the addition to the payee's name of such words as "executor," "administrator," "executor of A. B.," &c., constitutes mere description, and such a bill or note will in general be treated as the individual property of the payee and may be sued by him as such.³ But where the payee's letters testamentary have been revoked and the will, under which he acted, set aside, it seems that he can no longer sue on such a note, but that the action must be brought by the administrator *de bonis non*.⁴

A distinction is made, however, between private agents and public officers, which is also the case, as we have seen, where they are makers or indorsers. Thus, a tax collector cannot sue in his individual name on a note given to him as collector for taxes.⁵ If, however, he had paid the taxes of

619 (1864); *Bank of Manchester v. Slason*, 13 Vt. 334 (1841); *Rutland, &c., R. R. Co. v. Cole*, 24 *Ib.* 33 (1851); *Nave v. Hadley*, 74 Ind. 155 (1881); *Wright v. Boyd*, 3 Barb. 523 (1848); *Pratt v. Topeka Bank*, 12 Kans. 570 (1874). But see, *contra*, *Bank of United States v. Lyman*, 20 Vt. 666 (1848). And suit may be brought by the cashier in his individual name, *Fairfield v. Adams*, 16 Pick. 381 (1835); *McHenry v. Ridgely*, 3 Ill. 309 (1840); *Barney v. Newcomb*, 9 Cush. 46 (1851); *Garton v. Union City Nat. Bank*, 34 Mich. 279 (1876); *Johnson v. Catlin*, 27 Vt. 87 (1854). So held also as to a bond, *Horah v. Long*, 4 Dev. & B. 274 (1839).

¹*Bank of Genesee v. Patchin*, 19 N. Y. 312 (1859); *Bank of State of New York v. Muskinghum Branch*, 29 *Ib.* 619 (1864); *Farmers' and Mechanics' Bank v. Day*, 13 Vt. 36 (1841).

²*Baldwin v. Newbury*, 1 How. 234 (1863); *Bank of State of New York v. Muskinghum Branch*, 29 N. Y. 619 (1864).

³*Thomas v. Relfe*, 9 Mo. 373 (1845); *Moss v. Witcher*, 35 Tex. 388 (1871); *Carter v. Saunders*, 2 How. 851 (Miss. 1838); *Cravens v. Logan*, 7 Ark. 103 (1845); *Speelman v. Culbertson*, 15 Ind. 441 (1860). So, a note to the order of A. B., as guardian, may be transferred by his indorsement, and the indorsee may sue upon it in his own name, *Dorr v. Davis*, 76 Me. 301 (1884).

⁴*Leach v. Lewis*, 38 Ind. 155 (1871).

⁵*Dickson v. Gamble*, 16 Fla. 687 (1878). So, a note made payable to an Indian agent of the U. S. government in an official transaction, *Balcombe v. Northrup*, 9 Minn. 172 (1864); or to a land agent of the State, *Irish v. Webster*, 5 Me. 171 (1827); *State v. Boies*, 11 *Ib.* 474 (1834). But not so in the case of a note payable to "A. B., agent of the proprietors of the town of C.," *Bryant v. Durkee*, 9 Mo. 168 (1855). In like manner suit may be maintained by the U. S. government on a bill of exchange payable to the

the maker and the note was given on account of such payment, the note would be no bar to a suit upon the original consideration, although the note had been made originally to A. B. and altered and made void by addition of "collector" to his name.¹ On the other hand, it seems that a bill of exchange, payable to "the Treasurer General of the Royal Treasury of Portugal" and delivered to A. B. as such, might be indorsed and transferred by A. B. after leaving office. And where a bill made payable in this way was indorsed by A. B., still being Treasurer General, after the government which he first served had been changed by revolution, the title of such later government and of the indorsee could not be questioned.²

As we have seen, an official assignee is a *quasi*-public officer, and a note made to "A. B., assignee," and so indorsed by him, will not render him personally liable as indorser.³

It remains only for us to consider in this place the effect of an official title in the payee as notice to subsequent holders of a trust lodged in the payee. A bill or note made payable in this way is generally held to carry on its face a notice to all takers of the fiduciary character of the holder. This has been held in the case of a note payable to, and indorsed by, "A. B., Sheriff."⁴ In like manner a note payable to, and indorsed by, "A. B., trustee," is not negotiable, and its transfer is subject to equitable defenses between the original parties.⁵ It has been held, however, in Minnesota, that a note payable to, and indorsed by, "A. B., trustee of

treasurer of the United States by name and official designation, *Dugan v. United States*, 3 Wheat. 172 (1818); *Crowell v. Osborne*, 14 Vroom 335 (1881).

¹ *York v. James*, 14 Vroom 332 (1881).

² *Soares v. Glyn*, 8 Q. B. 24 (1845).

³ *Bowne v. Douglass*, 38 Barb. 312 (1862).

⁴ *Renshaw v. Mills*, 38 Mo. 201 (1866). But see, *contra*, *Fletcher v. Schaumburg*, 41 Mo. 501 (1867).

⁵ *Third Nat. Bank v. Lange*, 51 Md. 138 (1878). In like manner a certificate of stock standing in the name of "A. B., trustee," puts a pledgee on inquiry as to the character of the trust, and the transfer is at his risk, *Shaw v. Spencer*, 100 Mass. 382 (1868). See, too, *Sturtevant v. Jaques*, 14 Allen 523; *Bancroft v. Consen*, 13 *Ib.* 50. But see, *contra*, *Bush v. Peckard*, 3 *Harring*. 385 (Del. 1841).

C. D.," does not carry to an innocent purchaser any notice of a restriction upon the payee's right to transfer it.¹

§ 159. **Payee's Name—"A. B. or Bearer"—Presumption as to Value.**—A bill of exchange, note or check may be and frequently is made payable to "bearer." This term, unless restricted by statute, indicates the holder, whoever he may be. The distinction, however, between the original payee and subsequent holders remains unchanged as regards the admissibility of equitable defenses, the original bearer being subject to all defenses which would have affected him if he had been named as payee in the instrument. The burden of proof as to whether the holder is the original payee or a subsequent purchaser and holder for value is a matter reserved for discussion in a later part of this work.

Commercial paper payable to bearer is at common law transferable by delivery without indorsement.² It is now common to draw railroad and other corporation bonds payable to bearer, and, as we have already seen, such bonds possess many, if not all, the characteristics of commercial paper.³ It was formerly held that a bond could not be made payable to bearer, but might be indorsed by the payee named in it so as to become payable to the bearer.⁴ But a declaration upon a corporation bond payable to bearer need not now show to whom it was first delivered, although the bond be registered and by the rules of the company transferable only on its books.⁵ Coupons for interest payable to bearer and detached from their bonds are likewise negotiable instruments and pass by delivery.⁶

¹Downer v. Read, 17 Minn. 493 (1871).

²Chitty 180; 1 Daniel 109; 1 Edwards § 139; 1 Parsons 30; Story on Bills § 56; Story on Prom. Notes § 36; Grant v. Vaughan, 3 Burr. 1526; Bullard v. Bell, 1 Mason C. C. 243 (1817); Wilbour v. Turner, 5 Pick. 526 (1827); Sprowl v. Simpkins, 3 Ala. 515 (1842); Edison v. Frazier, 9 Ark. 219 (1848); Tillman v. Ailles, 5 Sm. & M. 373 (1845); Avery v. Latimer, 14 Ohio 542 (1846); Jones v. Westcott, 2 Brev. 166 (1807).

³See Chapter III.

⁴Marsh v. Brooks, 11 Ired. 409 (1850).

⁵Savannah, &c., R. R. Co. v. Lancaster, 62 Ala. 555 (1878).

⁶Walnut v. Wade, 13 Otto 683 (1880); Concord v. National Bank of Derby Line, 51 Vt. 144; First Nat. Bank v. Mt. Tabor, 52 Ib. 93 (1879).

The common law rule making notes and bills, which are payable to bearer, transferable by delivery, has been restricted in *Indiana* to notes made payable at a bank in that State.¹ And in *Alabama* such notes and bills are only transferable by delivery if made by a bank and "issued to circulate as money."² In other cases they are transferable only by indorsement or assignment;³ and the bearer cannot bring suit in his own name.⁴

In an early case in Massachusetts it was held that, in the absence of "value received" or other similar words importing consideration, the holder of an order payable to bearer must show himself to be a holder for value.⁵ In general, however, it is true of commercial paper payable to bearer, as in the case of a payee designated by name, that the holder is presumed to be a holder for value.⁶ This presumption is changed and the burden of proof in respect to value is

¹ *McNitt v. Hatch*, 4 Blackf. 531 (1838).

² "All bonds, bills or notes, except those issued to circulate as money, payable to anything or bearer, to any fictitious person or bearer, or to bearer only, must be construed as payable to the person from whom the consideration moved; if payable to an existing person or bearer, must be construed as if payable to such person or order," Ala. Code 1876 § 2098; Code 1852 § 1529. The statute of Alabama entitled an "Act to prevent the institution of illegal and oppressive suits in the United States courts in this State," approved June 30th, 1837 (Meek's Supp. 108 § 1), provides that "all bonds, bills or notes which shall be made payable to any person or persons or bearer, or to any corporation or bearer, shall have the effect of creating an obligation or liability in favor of the corporation or person or persons only to whom any such bond or note may be expressly made payable, and no one but such person or persons or their indorsee or personal representative shall have a right to maintain in his own name an action upon any such bond, bill or note." This act has been held not to apply to such bond, bill or note issued by a banking association, *Kemper, &c., Banking Co. v. Schieffelin*, 5 Ala. 493 (1843).

³ "All bonds, contracts and writings for the payment of money or other thing, or the performance of any act or duty, are assignable by indorsement, so as to authorize an action thereon by each successive indorsee," Ala. Code 1876 § 2099; Code 1852 (1530). This applies also to a non-negotiable corporation bond payable to bearer, *Blackman v. Lehman*, 63 Ala. 547 (1879).

⁴ *Clark v. Field*, 1 Ala. 468 (1840). As to the effect of this statute in an action brought in Mississippi on an Alabama note, see *Hemphill v. Bank of Alabama*, 6 Sm. & M. 44 (1846).

⁵ *Ball v. Allen*, 15 Mass. 433 (1819).

⁶ *Mauran v. Lamb*, 7 Cow. 174 (1827).

thrown on the holder, if the note be proved to have been lost or stolen from a former rightful owner.¹

§ 160. "A. B. or Bearer"—"A. B., Bearer"—"A. or Holder."—At common law a bill or note payable to "A. B. or bearer," is equivalent to one payable to bearer only.² And this is true also of a note payable to "A. B. or holder."³ Such note or bill, like one payable to bearer, is transferable by delivery.⁴ The holder is *prima facie* the lawful owner and need not prove title to the paper.⁵ And the declaration on such a note need only aver possession, without alleging any express promise to the plaintiff.⁶ So, too, if it have been transferred by the indorsement of A. B., the indorsement need not be proved.⁷ And such a note may be delivered in the first instance to any person without regard to the name of A. B. in it.⁸ But a distinction was formerly made in Ohio as to transfer by delivery between such notes and sealed notes payable to "A. B. or bearer," and it was held that a sealed note so payable could only be transferred by indorsement.⁹

In Illinois a distinction is made between notes and bills payable to "bearer" and those payable to "A. B., or bearer,"

¹ Jones v. Westcott, 2 Brev. 166 (1807). And where a note payable to A. B. or bearer was in the hands of the payee a few days before his death, he dying intestate and in debt, and was afterwards held and negotiated by his widow without letters of administration, it was held to be *prima facie* part of the payee's estate unlawfully transferred, Lounsbury v. Depew, 28 Barb. 47 (1858).

² Ellis v. Wheeler, 3 Pick. 18 (1825); Eddy v. Bond, 19 Me. 461 (1841); Smith v. Clopton, 4 Tex. 109 (1849); McDonald v. Harrison, 12 Mo. 447 (1849).

³ Putnam v. Crymes, 1 McMull. 9 (1840).

⁴ *Id.* But a note payable to "A. B. or bearer * * *" to be kept in the hands of P. T., "is not transferable by delivery by reason of the restriction contained in it, Truesdell v. Thompson, 12 Metc. 565 (1847). See, too, Beekman v. Wilson, 9 *Id.* 434.

⁵ Dole v. Weeks, 4 Mass. 451 (1808); Ellis v. Wheeler, 3 Pick. 18 (1825); Eddy v. Bond, 19 Me. 461 (1841); McDonald v. Harrison, 12 Mo. 447 (1849).

⁶ Dole v. Weeks, 4 Mass. 451 (1808); Gilbert v. Nantucket Bank, 5 *Id.* 97 (1809).

⁷ Willbourn v. Turner, 5 Pick. 526 (1827).

⁸ Gage v. Sharp, 24 Iowa 15 (1867).

⁹ Avery v. Latimer, 14 Ohio 542 (1846).

and the latter can only be transferred by indorsement.¹ This is so also in Missouri, or was so held in 1838 by an apparently forced construction of a statute existing in the same form in many States.² The same rule is expressly laid down by statute, already cited, in Alabama,³ although a different rule prevailed there prior to 1837.⁴ A similar distinction in Texas was held not to apply to such a note indorsed in blank by A. B., until its transfer was again restricted by special indorsement.⁵

Where a note is made payable "to — or bearer," the original holder may sue upon it without filling the blank, on averment and proof that the note was delivered to him by the maker and that he is the owner and *bona fide* holder of it.⁶

As we have seen, other words, such as "holder," may be used with the same effect as the word "bearer." Thus, if a note be payable "to the order of the indorser," it may be sued on by any *bona fide* holder.⁷ But a note payable to "A. B., bearer," is a note payable to A. B. only and not to bearer, and is non-negotiable.⁸ On the other hand, if a note made by two persons be payable to one of them "or bearer," the bearer may sue both makers although the payee named could not do so.⁹

§ 161. Payee's Name—Fictitious.—Notes and bills are

¹Garvin v. Wiswell, 83 Ill. 215 (1876); Wilder v. De Wolf, 24 Ib. 190 (1860); Roosa v. Crist, 17 Ib. 450 (1856); Hilborn v. Artis, 4 Ib. 344. The Illinois statute provides that any note, &c., "payable to any person named as payee therein shall be assignable by indorsement thereon," &c., 1880 R. S. 726 § 4.

²Beatty v. Anderson, 5 Mo. 447 (1838), under the provision of the statute (R. C. 104) making it "due and payable as therein expressed."

³Clark v. Field, 1 Ala. 468 (1840); Carew v. Northrup, 5 Ib. 367 (1843).

⁴Sprowl v. Simpkins, 3 Ala. 515 (1842). Even though such note be made by an unchartered bank, Kemper, &c., Banking Co. v. Schieffelin, 5 Ala. 493 (1843).

⁵Johnson v. Mitchell, 50 Tex. 212 (1878).

⁶Rich v. Starbuck, 51 Ind. 87 (1875).

⁷United States v. White, 2 Hill 59 (1841).

⁸Warren v. Scott, 32 Iowa 22 (1871). So, an instrument reading, "Due to the bearer, five pounds, which I promise to pay to A. or order," Cock v. Fellows, 1 Johns. 143 (1806).

⁹Devore v. Mundy, 4 Strobb. 15 (1849).

sometimes made payable to the order of a fictitious person, where this is not forbidden or restricted by statute. Such paper is treated in general as if made payable to bearer.¹ And this is the force likewise of a bill or note payable to a fictitious person "or bearer."² Of the same force is a bill or note payable to "bills payable;"³ or to "the order of 1658;"⁴ or "to number 100 or bearer;"⁵ or "to J. S. or ship Fortune or bearer."⁶

In the same way the name used may be unintentionally that of a real person. Such name is still simply that of a fictitious payee, and the bearer can recover on the paper without indorsement.⁷ Or the name of the payee may be mistaken for a correct name that is similar to it, *e. g.* "E. S. & Sons" for "E. S.' Sons." In such case the parties intended may recover, as on an instrument payable to a fictitious person.⁸ So, too, a note payable to a non-existing corporation has a fictitious payee;⁹ or a note payable to and indorsed by a firm after the death of one of the partners.¹⁰

So, a note for payment "to order" simply, may be sued upon by the bearer as payable to a fictitious payee.¹¹ And the same thing is said of a note made payable to the order of A. for the purpose of raising money, but actually nego-

¹ Byles 85; Chitty 181; 1 Daniel 141; 1 Edwards § 136; 1 Parsons 32; Story on Bills § 56; Story on Prom. Notes § 39; *Ex parte* Royal Burgh of Scotland, 19 Ves. 311; Hunter *v.* Jeffery, Peake Add. 146; Phillips *v.* Im. Thurn, 18 C. B. (N. S.) 694, L. R. 1 C. P. 463; Stevens *v.* Strang, 2 Sandf. 138 (1848); Farnsworth *v.* Drake, 11 Ind. 101 (1858); Foster *v.* Shattuck, 2 N. H. 446 (1822); Kohn *v.* Watkins, 26 Kans. 691 (1881).

² State of Nevada *v.* Cleveland, 6 Nev. 181 (1870).

³ Willets *v.* Phoenix Bank, 2 Duer 121 (1853); Mechanics' Bank *v.* Straiton, 3 Keyes 365; 5 Abb. Pr. (N. S.) 11 (1867).

⁴ Willets *v.* Phoenix Bank, 2 Duer 121 (1853).

⁵ Ball *v.* Allen, 15 Mass. 433 (1819), no consideration being imported where none expressed.

⁶ Grant *v.* Vaughan, 3 Burr. 1526.

⁷ Foster *v.* Shattuck, 2 N. H. 446 (1822).

⁸ Stevens *v.* Strang, 2 Sandf. 138 (1848). And such a note is within the New York statute relating to fictitious payees, 1 R. S. 768 § 5.

⁹ Farnsworth *v.* Drake, 11 Ind. 101 (1858).

¹⁰ Cavitt *v.* James, 39 Tex. 189 (1873). In such case the maker is liable without indorsement.

¹¹ Davega *v.* Moore, 3 McCord 482 (1826).

tiated to B. for value paid by him.¹ On the contrary, where the maker had indorsed such a note in the payee's name, it was held that the holder could not treat A. as fictitious and sue without his indorsement.² But if the holder treats as fictitious the name of a real payee forged by the maker, the maker has been held to be estopped from any contest on that ground.³ It is evident that in this regard the acceptor's position is quite different from that of the drawer. But where he has accepted the bill and paid it to a *bona fide* holder under such an indorsement by the drawer, he cannot, after the drawer's insolvency, recover the money paid.⁴

§ 162. **Payee Fictitious—Transfer—Forgery.**—Where the payee's name is fictitious, it may be indorsed on the paper by the person to whom the bill or note is delivered.⁵ But a fraudulent indorsement of a fictitious payee's name will constitute a forgery.⁶ If a note or bill is payable to a fictitious person "or bearer," he may make title without indorsement.⁷ And if the instrument be payable to an assumed name, the holder may aver himself to be the person intended, and parol evidence will be admitted to prove this.⁸ But the burden is on the holder to prove that the payee named is a fictitious person.⁹ And where there is neither drawee named nor recital of "value received," the holder of an order must prove that he paid value for it.¹⁰

¹ *Hunt v. Aldrich*, 27 N. H. 31 (1853); *Elliot v. Abbot*, 12 *Ib.* 549 (1842); *Cross v. Rowe*, 22 *Ib.* 77 (1850). See, too, *Hortsman v. Henshaw*, 11 How. 177 (1850). But in Illinois such a note is invalid, *First Nat. Bank v. Strang*, 72 Ill. 559 (1874). In *Elliot v. Abbot*, *supra*, it was held that the holder could not sue *as indorsee*, although he had procured the nominal payee's indorsement after the maturity of the note.

² *Rogers v. Ware*, 2 Neb. 29.

³ *Meacher v. Fort*, 3 Hill 227 (So. Car. 1837).

⁴ *Hortsman v. Henshaw*, *supra*.

⁵ *Blodgett v. Jackson*, 40 N. H. 21 (1859).

⁶ *Chitty* 182; *Sex v. Taft*, Leach Cro. L. 172; *Tatlock v. Harris*, 3 T. R. 174; *Vere v. Lewis*, *Ib.* 182; *Minet v. Gibson*, *Ib.* 482, 1 H. Bl. 569; *Collis v. Emmett*, 1 H. Bl. 313.

⁷ *Lane v. Krekle*, 22 Iowa 399 (1867).

⁸ *Chenot v. Lefevre*, 8 Ill. 637 (1846).

⁹ *Maniort v. Roberts*, 4 E. D. Smith 83 (1855).

¹⁰ *Ball v. Allen*, 15 Mass. 433 (1819).

§ 163. **Payee Fictitious—Innocent Parties.**—Where the holder himself at the time he received such a bill knew that the payee was fictitious, and discounted the bill for the drawer's accommodation, he cannot recover against the acceptor, although the acceptance was made with like knowledge of the facts.¹ A note payable to the order of a fictitious person is, however, valid as a note payable to bearer in the hands of all parties against the maker and against all parties with notice by force of statute in many States.²

As a general rule all parties having knowledge of the fictitious character of the payee's name are liable on the paper at suit of a *bona fide* holder for value.³ This is the case also with reference to fictitious names forged by the person negotiating the paper, and with reference to paper negotiated by the drawer with a forged signature and indorsement.⁴

§ 164. Where an acceptor has knowledge of the fictitious character of the payee's name and indorsement, he is liable upon the paper to a *bona fide* holder.⁵ And where a bill of exchange is drawn by an arrangement between B. and C. in the name of a fictitious person, A., and to the order of A., and is accepted by B. and indorsed to C., B. is liable upon

¹Chitty 181; 1 Edwards § 136; Hunter v. Jeffery, Peake Add. 146.

²Maniort v. Roberts, 4 E. D. Smith 83 (1855). But the maker must have known the fictitious character of the payee when he executed the note, *Ib.* As to what knowledge of facts is necessary by the statute of New York, see Irving Nat. Bank v. Alley, 79 N. Y. 536 (1880). For the statute of New York and other States on this point, see *infra* § 169.

³Bytes 84; Chitty 181; 1 Edwards § 136; *Ex parte* Royal Burgh of Scotland, 19 Ves. 311; Hunter v. Jeffery, Peake Add. 146; *Ex parte* Clarke, 3 Bro. C. C. 238. This was first held in Stone v. Ireland at Nisi Prius A. D. 1769, cited 1 H. Bl. 316, and at Bar, in Tatlock v. Harris, 2 T. R. 174. See, too, Vere v. Lewis, 3 T. R. 182; Minet v. Gibson, *Ib.* 481, 1 H. Bl. 569; Collis v. Emmett, 1 H. Bl. 313; Gibson v. Hunter, 2 H. Bl. 187, 288; *Ex parte* Clarke, 3 Bro. C. C. 238; Thicknesse v. Bromilow, 2 Crompt. & J. 425; Forbes v. Espy, 21 Ohio St. 474 (1871); McCall v. Corning, 3 La. An. 409 (1848); Farnsworth v. Drake, 11 Ind. 101 (1858).

⁴An acceptor negotiating a bill payable to the drawer's order, knowing the drawer's signature and indorsement to be forged, cannot deny either drawing or indorsement, Beeman v. Duck, 11 M. & W. 251 (1843). Whether such an instrument should not be declared on as payable to bearer, *quere*, *Ib.*; Gibson v. Minet, 1 H. Bl. 569; Bennett v. Farnell, 1 Campb. 130.

⁵Hunter v. Blodget, 2 Yeates 480 (1799).

his acceptance even to C., and is estopped from setting up the fictitious character of the payee.¹ In order to hold the acceptor on a bill payable to, and indorsed in, a fictitious name, being the name of the drawer also, it is only necessary to prove the signature and indorsement to have been made by the same person.² It has also been held that one who accepts a bill, knowing the name of the payee and indorser to be fictitious, is liable to a *bona fide* holder for value on the common money counts.³

As evidence of the acceptor's knowledge in such case the circumstance of other similar acceptances is admissible.⁴ And in an action on such paper by a *bona fide* holder against the acceptor, the plaintiff need not prove consideration in the first instance.⁵

In England it has been held that a bill payable to a fictitious payee is not equivalent to one payable to bearer in a suit against a party not knowing of the fictitious character of the payee.⁶ But in a more recent case it was held that one who accepted such a bill for the honor of the drawer was liable upon it by force of an estoppel, although ignorant of the payee's name being fictitious, and although the drawer's signature had been forged.⁷ And it has been held in the United States that where one pretending to be the agent of the fictitious owner of a patent right, sold it and took a note for the purchase-money, the maker of the note was liable

¹Asphitel v. Bryan, 32 L. J. Q. B. 91, 33 *Ib.* 328; S. C., 3 B. & S. 474 (1863).

²Cooper v. Meyer, 10 B. & C. 468.

³Tatlock v. Harris, 3 T. R. 174.

⁴Gibson v. Hunter, 2 H. Bl. 187, 288. It is maintained, however, by Mr. Daniel (1 Daniel Negot. Inst. 118) that the acceptor is liable whether he have notice of the fictitious character of the payee's name or not. But the cases cited by him appear to apply this rule only where the maker has by his words or conduct raised an estoppel against himself.

⁵Vere v. Lewis, 3 T. R. 182.

⁶In Bennett v. Farnell, 1 Campb. 130, Lord Ellenborough held such a bill to be void and not equivalent to a bill payable to bearer. He, however, permitted a recovery by the holder of the consideration actually paid as money had and received. See, however, 1 Campb. 180c.

⁷Phillips v. Im. Thurn, 18 C. B. (N. S.) 694 (1865); S. C., L. R. 1 C. P. 463. See, too, Ort v. Fowler, 31 Kans. 478 (1884), where the maker of a note was held on like ground of estoppel, although ignorant that the note was made to a fictitious firm.

upon it at suit of a *bona fide* holder, although he had no knowledge of the fiction employed.¹

§ 165. **Payee Misnamed—Correction by Parol Evidence.**—It frequently occurs that the name of the payee in a commercial instrument is erroneously stated by mistake. Such misnomer is immaterial where no doubt is left as to the identity of the person intended.² In case of such mistake, as also in case of ambiguity arising from the existence of several persons of the same name, parol evidence is admissible to explain the intention of the parties.³ And it follows, from what has been said, that the mere misspelling in the indorsement of the payee's name is also immaterial.⁴

The following are instances of immaterial mistake in the payee's name, corrected by parol evidence of intention: "W. S. Bake" for "W. S. Baker;"⁵ "W. R. & P. Resor" for "W. & R. P. Resor;"⁶ "Elizabeth Willis" for "Elizabeth Willison."⁷ Again, where a note was made to E. H. and secured by mortgage to E. H. 3d, parol evidence was admitted to show that a firm consisting of E. H. and E. H. 3d, and doing business in the individual name of E. H., was intended.⁸ And where the payee has been wrongly named in a note or bill, the holder may show that he was himself intended as payee and that the paper was delivered to him as such.⁹

¹Lane v. Krekle, 22 Iowa 399 (1867). And the same is true as to the liability of the drawer of a bill of exchange under similar circumstances, Kohn v. Watkins, 26 Kans. 691 (1881).

²Rex v. Box, 6 Taunt. 325. But a note payable, by mistake, to Joseph R. and delivered to John R., cannot be transferred by the latter's indorsement, although he was the person intended, both being persons in *esse*, Bolles v. Stearns, 11 Cush. 320 (1853).

³Chitty 180; Willis v. Barrett, 2 Stark. 29; Mead v. Young, 4 T. R. 28; Midway Cotton Mfg. Co. v. Adams, 10 Mass. 360 (1813); Jester v. Hopper, 13 Ark. 43 (1853); Taylor v. Strickland, 37 Ala. 642 (1861); Leaphardt v. Sloan, 5 Blackf. 278 (1840).

⁴Colson v. Arnot, 57 N. Y. 253 (1874).

⁵Williams v. Baker, 67 Ill. 238 (1873). So, "A. Formey" for "A. Formby," Taylor v. Strickland, 37 Ala. 642 (1861).

⁶Patterson v. Graves, 5 Blackf. 593 (1841).

⁷Willis v. Barrett, 2 Stark. 29 (1816). Or, "Charles V. Jacobs" instead of "Charles B. Jaques," Jacobs v. Benson, 39 Me. 132 (1855).

⁸Hall v. Tufts, 18 Pick. 455 (1836).

⁹Jester v. Hopper, 13 Ark. 43 (1853); Patterson v. Graves, 5 Blackf. 593 (1841); Hall v. Tufts, 18 Pick. 455 (1836).

So, where a sealed bond was made to the Standing Committee of the New York African Society, the corporation was allowed to show itself intended as obligee and to maintain an action as such on the bond.¹ And where a corporation named as payee has changed its name, *e. g.* from "Sonoma Academy" to "Cumberland College," it may maintain an action in its new name on a note given to it by its old name on mere proof of identity.²

§ 166. **Name Common to Several Persons.**—Where a father and son bear the same name, there is a presumption, it is said, that the father was intended in a note payable to the name borne by both, unless the contrary appear.³ Possession and indorsement by the son will be deemed sufficient, however, to rebut this presumption.⁴

Although, as we have seen, a mere mistake of name is immaterial and capable of correction by parol evidence, a note made to a payee by a wrong name actually borne by another existing person, cannot be indorsed by the payee who was intended but not named, *e. g.* John P. Reed being the payee named, and Joseph P. Reed assuming himself to be the payee intended and indorsing the note as such.⁵ And, in Illinois, it is not even admissible to prove a note made payable to "Bart. Whalen" under a declaration setting forth a note to "Bartholomew Whalen."⁶ Where a person of the same name as the payee, not being the person intended in the instrument, obtains possession of it and indorses it, his indorsement is a forgery and does not effect a transfer of the paper.⁷ In a case of this sort, where a note was made payable, by mistake, to the order of H. L. C., in-

¹New York African Soc. *v.* Varick, 13 Johns. 38 (1816).

²Cumberland College *v.* Ish, 22 Cal. 640 (1863).

³Sweeting *v.* Fowler, 1 Stark. 106; Wilson *v.* Stubs, Hob. 330; Stebbing *v.* Spicer, 8 C. B. 827 (1849).

⁴Stebbing *v.* Spicer, 8 C. B. 827 (1849).

⁵Bolles *v.* Stearns, 11 Cush. 320 (1853).

⁶Rives *v.* Marrs, 25 Ill. 315 (1861). And a judgment against "Barent H." will not support a declaration against "Barnard H.," *Ducommun v. Hysinger*, 14 Ill. 249 (1852).

⁷Byles 83; Mead *v.* Young, 4 T. R. 28.

stead of L. L. C., and was delivered to the right person, L. L. C., and by him transferred to the plaintiff for valuable consideration, but was actually paid to H. L. C., who knew of the mistake and availed himself of it, H. L. C. was held liable to the plaintiff in an action for money received.¹

§ 167. **Payee—Blank.**—The payee's name, like other parts of a bill or note, may be left blank at the time when the paper is issued. Where this happens, the bill or note is in legal effect payable to bearer.² Such blank may be filled up by a *bona fide* holder for value with his own name and sued upon by him as if originally payable to him.³ And it may be filled in this manner at any time before trial.⁴ It has been held in Illinois that a due-bill reading "good for fifty cents" may be completed by the holder by adding the words "to myself or order," and that filling such blank at all is wholly unnecessary to make the instrument a promissory note.⁵ This case seems to conflict with the rule restricting the authority to fill blanks to cases in which a blank has been plainly and intentionally left by the maker.

Sometimes the intention of the maker, as to a blank, may be explained by a contemporaneous instrument construed

¹*Camp v. Tompkins*, 9 Conn. 545 (1833).

²1 Daniel 151; *Crutchley v. Clarence*, 2 M. & S. 91 (1813); *Wookey v. Pole*, 4 B. & Ald. 6; *Wood v. Wellington*, 30 N. Y. 218 (1864); *Dinsmore v. Duncan*, 57 *Ib.* 573 (1874).

³Byles 85; *Chitty* 162, 179; 1 Daniel 151; 1 Edwards 2141; 1 Parsons 33, *Story on Bills* 255; *Story on Prom. Notes* 237; *Crutchley v. Clarence*, 2 M. & S. 90; *Crutchley v. Mann*, 1 Marsh. 31, 5 Taunt. 529; *Powell v. Duff*, 3 Campb. 182; *Usher v. Dauncey*, 4 *Ib.* 97; *Atwood v. Griffin*, Ry. & Mood. 42, 425; *Dinsmore v. Duncan*, 57 N. Y. 573 (1874); *Hardy v. Norton*, 66 Barb. 527 (1873); *Stahl v. Berger*, 10 Serg. & R. 170 (1823); *Bank of Kentucky v. Garey*, 6 B. Mon. 626 (1846); *Greenhow v. Boyle*, 7 Blackf. 56 (1843); *Boyd v. McCann*, 10 Md. 118 (1856); *Sittig v. Birkstack*, 38 *Ib.* 158 (1873); *Dunham v. Clogg*, 30 *Ib.* 284 (1868); *Weston v. Myers*, 33 Ill. 424 (1864); *Seay v. Bank of Tennessee*, 3 Sneed 558 (1856); *Schooler v. Tilden*, 71 Mo. 580 (1880); *Aiken v. Cathcart*, 3 Rich. 133; *Witte v. Williams*, 8 So. Car. 290 (1876); *Rich v. Starbuck*, 51 Ind. 87 (1875); *Van Etta v. Evenson*, 28 Wis. 33 (1871); *Brummel v. Enders*, 18 Gratt. 873 (1868); *Farmers', &c., Bank v. Horsey*, 2 Houst. 385 (1861); *Townsend v. France*, *Ib.* 441 (1862). Or if indorsed by the original payee the blank may be filled with his name, *Elliott v. Chesnut*, 30 Md. 562 (1869).

⁴*Schooler v. Tilden*, 71 Mo. 580 (1880).

⁵*Weston v. Myers*, 33 Ill. 424 (1864).

with the note or bill. This occurs in the case of a note payable to "A. or —," and explained by a collateral mortgage as intending the bearer, and the assignee of the mortgage as such bearer may maintain an action on the note.¹ A blank indorsement, like the blank for payee in the body of the instrument, may be filled out by a *bona fide* holder with his own name.² But it has been held that, to render an acceptor liable upon a bill of exchange issued with a blank for the payee's name, the holder must prove his authority from the drawer to fill such blank with his own name.³

Where the payee's name is left blank, the instrument remains incomplete, and it is said not to be a bill of exchange until such blank is filled.⁴ If, however, a draft is signed and is also indorsed by the drawer, it is sufficient and complete although made payable "to the order of —," and the blank not filled.⁵ So, if a note is made payable "to — or bearer," the holder may sue upon it without filling up the blank, alleging and proving that the note was delivered to him by the maker and that he is the *bona fide* holder and owner of it.⁶

§ 168. It has been held, in England, that an instrument in the form of a bill of exchange made payable "to — or order," being incomplete and therefore no bill of exchange, cannot be the subject of a forgery.⁷ But the contrary doctrine has been held in a recent case in Indiana.⁸

Whether a blank of this character left in a sealed bond

¹ Elliott v. Deason, 64 Ga. 63 (1879).

² Hubbard v. Williamson, 4 Ired. 266; Wilder v. De Wolf, 24 Ill. 190 (1860).

³ Crutchley v. Mann, 1 Marsh. 31, 5 Taunt. 529; Atwood v. Griffin, Ry. & Mood. 425; 2 Carr. & P. 368; Awde v. Dixon, 6 Exch. 869.

⁴ Greenhow v. Boyle, 7 Blackf. 56 (1843).

⁵ Usry v. Saulsbury, 62 Ga. 179 (1879).

⁶ Rich v. Starbuck, 51 Ind. 90 (1875). See, too, Wood v. Wellington, 30 N. Y. 218 (1864); Weston v. Myers, 33 Ill. 424 (1864).

⁷ Rex v. Richards, Russ. & Ry. C. C. 193; Rex v. Randall, *Ib.* 195 (1811). See, too, 2 Leach C. C. 597; 2 East 933.

⁸ Harding v. The State, 54 Ind. 359 (1826).

can be filled by the holder, is a question upon which there is a wide disagreement among numerous authorities.¹ It has been held that a bond under seal payable to a railroad company "or its assigns," is not negotiable and cannot be transferred by an assignment "to — or bearer."² And it seems that a blank left for payee's name in a non-negotiable sealed bond cannot be filled by the holder.³

The implied authority to fill a blank left for the payee's name extends to a surety who has executed a note and left it with such a blank in the hands of his principal.⁴ Such implied authority is given by the maker of a note to a co-maker, for whose accommodation he has executed the note, notwithstanding an agreement between the makers that the blank should be filled out with some particular name only; and a *bona fide* holder, without notice of such agreement, may recover against both makers upon a note which has been filled up in contravention of the agreement.⁵ But where a note has been filled up with the name of A. and delivered to him by the maker, in disregard of an agreement between the maker and an indorser (who indorsed the note as guarantor before delivery) to the effect that a particular name other than A.'s should be inserted as payee, A. cannot recover against such indorser although he has taken the note for value and without notice of such agreement.⁶

§ 169. **Payee's Name—English and American Statutes.**—In many of the United States some provision is made by statute as to the name of the payee in commercial paper.⁷

¹To the effect that such blank can be filled, see *Gourdin v. Commander*, 6 Rich. 497 (1852). For other cases as to blanks left to be filled in sealed bonds, see Chapter VI.

²*Clarke v. City of Zanesville*, 1 Biss. C. C. 98 (1856)

³*Barden v. Southerland*, 70 N. C. 528.

⁴*Armstrong v. Harshman*, 61 Ind. 52 (1878); S. C., 43 *Ib.* 126.

⁵*Wilson v. Kinsey*, 49 Ind. 35 (1874).

⁶*Riddle v. Stevens*, 32 Conn. 346 (1865).

⁷In *California* "the person to whose order a negotiable instrument is made payable must be ascertainable at the time the instrument is made" (Civ. Code of 1872 § 8089). Such instrument, "payable to a person named,

In England the Statute of 17 Geo. III. c. 30 required bills, and all other negotiable instruments under £5, to express the names and respective places of abode of the persons to

but with the words added 'or to his order,' or 'to bearer,' or words equivalent thereto, is in the former case payable to the written order of such person and in the latter case payable to the bearer" (*Ib.* 8101). Such instrument "payable to the order of the maker or of a fictitious person, if issued by the maker for a valid consideration without indorsement, has the same effect against him and all other persons having notice of the facts as if payable to bearer" (*Ib.* § 8102), and "if made payable to the order of a person obviously fictitious, is payable to the bearer" (*Ib.* 8103). In *Colorado* such instruments as are included in the Statute of Anne there enacted require a payee (1877 G. L. p. 110 § 90). So, in *Connecticut* (Gen. St. Rev. 1875 p. 343 § 1). In *Dakota* the same provisions have been enacted as in *California* (Rev. Code 1877 §§ 1823, 1832-1834). In *Georgia* a promissory note is defined by statute to be a "written promise made by one or more to pay to another, or order, or bearer," &c. (Code 1873 § 2774). Notes payable to bearer are transferable by delivery (*Ib.* § 2775). In *Idaho* notes to any person, order or bearer are made negotiable (Rev. L. 1875 p. 652 § 1). If made payable "to the maker thereof or to the order of a fictitious person" and negotiated by the maker, they are equivalent to notes payable to bearer as against the maker and all persons having knowledge of the facts (*Ib.* § 5). In *Illinois* notes payable to bearer are transferable by delivery, and the indorser is in such case liable as guarantor (1880 R. S. c. 98 § 8). Notes "payable to any person therein named as payee" are assignable by indorsement so that the assignee may sue in his own name, and the assignor is liable if the assignee use due diligence (*Ib.* §§ 4-7). In *Kansas* bonds, notes and bills "payable to any person or order, or to any person or bearer, shall be negotiable by indorsement thereon if payable to order, and by delivery if payable to bearer" (1879 Comp. L. c. 14 § 1). In *Kentucky* a promissory note made by the maker payable to himself or order and indorsed by him is binding on him (1877 G. S. c. 22 § 13). In *Michigan* negotiable notes may be payable "to any other person or to his order, or to the order of any other person, or unto the bearer" (1 Comp. L. 1871 p. 515 § 1), and if made to the order of the maker or of a fictitious person, and negotiated by the maker, such note has the effect of a note payable to the bearer as against the maker and all persons having knowledge of the facts (*Ib.* § 4). In *Minnesota* a note payable to the order of the maker or of a fictitious person, and negotiated by the maker, is by statute made equivalent to a note payable to bearer as against the maker and all persons having knowledge of the facts (1878 G. S. c. 23 § 16). In *Missouri* negotiable notes may be made payable to bearer (1 R. S. 1879 c. 10 § 547) or order, or to a payee therein named. If made payable to the order of the maker or of a fictitious person, and negotiated by the maker, they are equivalent to notes payable to bearer as against the maker and all persons having knowledge of the facts (1 R. S. 1879 c. 10 § 549; 1877 P. L. p. 36). In *Nebraska* negotiable instruments must be made payable "to a person or order, or a person or assigns" (1873 G. S. c. 32 § 1; 1866 R. S. c. 27). In *Nevada* all negotiable notes must be to another person than the maker or his order, or to the order of such person or to bearer (1 Comp. L. 1873 c. 5 § 9; 1861 P. L. p. 4). If made payable to the order of the maker, or of a fictitious person, and negotiated by the maker, they are equivalent to notes payable to bearer as against the maker and all persons having knowledge of the facts (*Ib.*) But see *Wayman v. Toneyson*, 4 Nev. 124 (1868). In *New Jersey* negotiable notes under the statute must be payable to another person than the maker, or order, or unto bearer (Act of 1795 Pat. Rev. p. 342 § 4; 1874 Rev. p. 897 § 1). So, in *New York* (2 R. S., ed. 1875, p. 1160 § 1; 1 R. L. 1801 p. 151). The *New York Revised Statutes* contain a further provision similar to that in *Nevada*,

whom or to whose order the same should be payable. This Act was made perpetual by the Statute of 27 Geo. III. c. 16 and is still in force.¹

§ 170. **Foreign Statutes.**—By foreign statutes the payee's name is generally made a necessary part of every bill of exchange, promissory note or other commercial instrument.² And in some foreign countries, chiefly those governed by Spanish law, the payee's full name is required.³ In France and the other countries governed by the Code Napoleon a bill of exchange must be payable to the order either of the drawer or of a third person.⁴

In Spain and the Spanish American States it is also necessary to a good indorsement of commercial paper that the indorsee's name should be expressed, and if this is not done

supra (2 R. S. p. 1160 § 5). In *Ohio* negotiable instruments must be payable to "a person or order, or a person, or assigns" (1880 R. S. § 3171; 1830 P. L. p. 217 § 1). In *Oregon* there are the same statutory provisions on this subject as in New York (1872 G. L. c. 48 §§ 1, 4). In *Rhode Island* negotiable notes may be payable to "bearer" (1872 G. S. c. 129 § 6). In *South Carolina* only notes payable "to another person (than the maker) or corporation, or their order, or unto bearer," are made negotiable (1873 R. S. p. 319 § 8). So, in *Tennessee*, "to any other person or order, or to the order of any other person" (1871 C. S. § 1956; 1762 P. L. c. 9 § 2). In *Vermont* notes and bills may be made payable to any person, or order, or bearer (1862 G. S., ed. 1870, p. 508 § 5). In *Wisconsin* notes made to the order of the maker, or of a fictitious person, and negotiated by the maker, have the effect of notes payable to bearer as against the maker and all persons with notice (1878 R. S. § 1679).

¹Chitty 180. And see 7 Geo. IV. c. 6. And it seems that, in England, such instruments if made payable to bearer are neither negotiable nor transferable. Chitty 188 note *m*; *Quarterman v. Green*, 1 C. & P. 92; *Hill v. Lewis*, 1 Salk. 132.

²*Argentine Republic* (1862 Code Com. Arts. 776, 916); *Bolivia* (1834 Code Com. Arts. 362, 463, 469); *Brazil* (1850 Code Com. Arts. 354, 427); *Germany* (1848 Exch. Law Art. 4); *Austria* (1850 Exch. Law Art. 4); *Holland* (1838 Exch. Law Arts. 101, 208, 210); *Hungary* (1860 Exch. Law ch. 1 § 14); *Italy* (1865 Code Com. Arts. 196, 273); *Nicaragua* (1869 Code Com. Arts. 241, 312, 316); *Guatemala, Honduras and Paraguay* (1774 Orde. Bilbao c. 13 § 2; ch. 14 § 1); *Peru* (1853 Code Com. Art. 381); *Portugal* (1833 Code Com. Arts. 321, 426); *Sweden and Norway* (1851 Exch. Law ch. 1 § 1); *Switzerland* (1805 Zurich § 1; 1863 Basle § 3; 1859 Berne § 3); *Uruguay* (1865 Code Com. Art. 789); *Venezuela* (1862 Code Com. Art. 1; Law II. Art. 1).

³*Chili* (1865 Code Com. Arts. 633, 771); *Colombia* (1853 Code Com. Arts. 384, 517); *Costa Rica* (1853 Code Com. Arts. 373, 510); *Ecuador* (same as Spain); *Mexico* (1854 Code Com. Arts. 223); *Peru* (1853 Code Com. Art. 522, as to notes); *Russia* (1832 Exch. Law Art. 541); *Salvador* (1855 Code Com. Art. 381); *Spain* (1829 Code Com. Arts. 426, 563).

⁴*France* (1807 Code Napoleon Art. 110; Bedarride Droit Com. vol. 1 p. 139). The Code Napoleon governs also *Belgium, Greece, the Canton of Geneva and Turkey*.

the indorsement is void.¹ The indorsee's name is also required in France and in some other countries, and its omission renders the indorsement a mere power of attorney to collect payment for the indorser.² In some of the States of South America, while the indorsee's name is necessary to a complete indorsement, an indorsement in blank is nevertheless available, and is equivalent to an indorsement to the order of the bearer.³ Other foreign statutes, while prescribing that a proper indorsement shall name the indorsee, provide that an indorsement in blank shall carry with it power to the indorsee to fill the blank.⁴ And in Russia this is the case even after acceptance of the bill.⁵

By most foreign statutes it is provided that a bill or note may be made payable to the drawer or maker.⁶ But in Germany if a bill or note is made payable in this way and indorsed in blank, it is said to be invalid.⁷

And a bill or note cannot be made payable to bearer in Germany.⁸ And formerly such bills were forbidden in

¹*Bolivia* (1834 Code Com. Arts. 381, 383); *Colombia* (1853 Code Com. Art. 426); *Costa Rica* (1853 Code Com. Art. 416); *Ecuador* (same as Spain); *Mexico* (1854 Code Com. Arts. 360, 362); *Nicaragua* (1869 Code Com. Art. 261); *Guatemala*, *Honduras* and *Paraguay* (1774 Orde. Bilbao ch. 13 § 3); *Salvador* (1855 Code Com. Art. 423); *Spain* (1829 Code Com. Art. 469).

²*France* (Code Napoleon Arts. 137, 138). This law governs *Belgium*, *Geneva*, *Greece*, *Hayti*, *San Domingo* and *Turkey*. So, too, in *Hungary* (1860 Exch. Law §§ 30, 34); *Italy* (1865 Code Com. Art. 223); *Portugal* (1833 Code Com. Arts. 355, 357); *Venezuela* (1862 Code Com. Arts. 34, 36).

³*Argentine Republic* (1862 Code Com. Arts. 803, 805); *Brazil* (1850 Code Com. Arts. 361, 362); *Uruguay* (1865 Code Com. Arts. 822, 823).

⁴*Chili* (1865 Code Com. Arts. 658, 661); *Sweden* and *Norway* (1851 Exch. Law ch. 1 § 12); *Switzerland* (1863 Basle § 12; 1859 Berne § 12).

⁵*Russia* (1832 Exch. Law Arts. 559, 562).

⁶*France* (1807 Code Napoleon Art. 110; Bedarride Droit Com. vol. 1 p. 136). This provision of the Code Napoleon is in force also in *Belgium*, *Geneva*, *Greece*, *Hayti*, *San Domingo* and *Turkey*. The statute makes like provision in *Bolivia* (1834 Code Com. Art. 353); *Chili* (1865 Code Com. Art. 639); *Colombia* (1853 Code Com. Art. 388); *Costa Rica* (1853 Code Com. Art. 377); *Denmark* (1825 Exch. Law § 5); *Germany* (1848 Exch. Law Art. 6); *Austria* (1850 Exch. Law Art. 6); *Holland* (1838 Exch. Law Art. 101); *Ecuador* (same as Spain); *Italy* (1865 Code Com. Art. 196); *Mexico* (1854 Code Com. Art. 325); *Peru* (1853 Code Com. Art. 387); *Portugal* (1833 Code Com. Art. 322); *Lower Canada* (1867 Civil Code §§ 2282, 2346); *Russia* (1832 Exch. Law Art. 541); *Salvador* (1855 Code Com. Art. 385); *Spain* (1829 Code Com. Art. 430); *Sweden* and *Norway* (1851 Exch. Law ch. 1 § 2); *Switzerland* (1863 Basle § 6; 1859 Berne § 6); *Venezuela* (1862 Code Com. Art. 2).

⁷Thöl W. R. 151.

⁸Thöl W. R. 150.

France; but it is said by Mr. Chitty that they are now allowed.¹ In Brazil a note made by a merchant payable to bearer has the same force as a "Provincial Bill" and does not require protest.² In the Argentine Republic, notes, due-bills and orders may be made payable to bearer and pass by delivery.³ So, too, in Lower Canada;⁴ and, as to promissory notes, in Uruguay;⁵ and, as to bills of exchange, in Denmark;⁶ while in Mexico and Salvador both notes and certificates of deposit made payable to bearer are void.⁷

Leaving a blank for the payee's name renders a bill invalid in Germany.⁸ But such blank is permitted and may be filled by a *bona fide* holder, as at common law, in some of the South American States.⁹

¹Chitty 180; Decrees of June 7th, 1611, and March 1624. See Pothier pl. 221; Chitty 180, and 1 Pardess. 358, as to later law. The Code Napoleon (Art. 110) contemplates the payee being named in a bill of exchange and provides, as we have already seen, only for bills payable to "the order of a third person or of the drawer himself."

²Brazil (1850 Code Com. Art. 426).

³Argentine Republic (1862 Code Com. Art. 916).

⁴Lower Canada (1867 Civil Code §§ 2282, 2344).

⁵Uruguay (1865 Code Com. Art. 933).

⁶Denmark (1825 Exch. Law § 6).

⁷Mexico (1854 Code Com. Art. 452); Salvador (1855 Code Com. Art. 516).

⁸Thöl W. R. 150.

⁹Argentine Republic (1862 Code Com. Art. 776); Uruguay (1865 Code Com. Art. 789).

III. THE DRAWEE.

171. Drawee's Name—In General.

172. Drawee's Name Identical with Drawer or Payee.

§ 171. **Drawee's Name—In General.**—From the nature of a bill of exchange it follows that the person upon whom it is drawn, and who is expected to pay it, should appear in the instrument. This is usually effected by a direction to the drawee by name, *e. g.* "To A. B.," with or without his address on the face of the bill at the top or bottom.¹ The latter is, however, the more common. In Italy and Holland the direction to the drawee is often placed on the back of the bill. It is a general rule of the common law that the drawee's name should appear on the bill.² But the omission of it may be supplied by an acceptance, this being construed to amount either to an admission or waiver of a more formal address.³ It is also generally required by foreign statutes that the drawee's name should appear.⁴ In Italy and in Chili the drawee's full name is requisite;⁵ and in the Span-

¹ But if a bill is directed to no one, but signed across its face by A., and in the position usual for the drawee's name by B., the latter is *prima facie* the drawee and the former an indorser, guarantor or acceptor *supra protest*, as may be determined by parol evidence, and such evidence is admissible against the payee, *Walton v. Williams*, 44 Ala. 347 (1870).

² Byles 89; Chitty 188; 1 Daniel 106; 1 Edwards § 209; 1 Parsons 61; *Peto v. Reynolds*, 9 Exch. 410; S. C., 11 *Ib.* 418; *Watrous v. Holbrook*, 39 Tex. 572 (1873).

³ Byles 89; Chitty 188; Story on Bills § 58; *Gray v. Milner*, 8 Taunt. 739 (1819); S. C., 3 Moore 90; *Watrous v. Holbrook*, *supra*. "The acceptance," says Ingraham, J., "may be considered as supplying the defect and as being an admission by the acceptor that he is the person intended. At any rate, it does not lie with him to make such defense after having admitted by the acceptance that he was the person intended and after having promised to pay the draft at maturity. He is estopped by his own act from such a defense," *Wheeler v. Webster*, 1 E. D. Smith 3 (1850).

⁴ *Argentine Republic* (1862 Code Com. Art. 776); *Belgium* (Code Napoleon Art. 110); *Bolivia* (1834 Code Com. Arts. 362, 463); *Brazil* (1850 Code Com. Arts. 354, 427); *Germany* (1848 Exch. Law Art. 4); *Austria* (1850 Exch. Law Art. 4); *Holland* (1838 Exch. Law Art. 100); *Hungary* (1860 Exch. Law ch. 1 § 14); *Nicaragua* (1869 Code Com. Art. 241); *Peru* (1853 Code Com. Art. 381); *Portugal* (1833 Code Com. Art. 321); *Sweden and Norway* (1851 Exch. Law ch. 1 § 1); *Uruguay* (1865 Code Com. Art. 789); *Venezuela* (1862 Code Com. Art. 1).

⁵ *Chili* (1865 Code Com. Art. 633); *Italy* (1865 Code Com. Art. 196).

ish-American States and some others his name and residence must both appear on the bill.¹

At common law the name of the drawee is not necessary if he be otherwise sufficiently designated. This is the case in a bill addressed to the "Steamer Dorrance and owners,"² or to "the agent and owners of" a certain ship.³ Moreover, a bill of exchange may be directed to a person in a representative or official character and so accepted by him.⁴ So, too, it may be addressed to him as an individual and accepted by him in a representative capacity⁵ or *vice versa*.⁶ So, it may be drawn on a company and accepted by its manager as such;⁷ and the corporation being misnamed as drawee will not relieve it from liability, if its identity be unquestioned.⁸

But a bill of exchange cannot be addressed to one person and accepted by another.⁹ Nor can a letter of credit, drawn by mistake on John & Joseph Naylor & Co., be accepted by

¹ *Chili* (1865 Code Com. Art. 633); *Colombia* (1853 Code Com. Art. 384); *Costa Rica* (1853 Code Com. Art. 373); *Ecuador* (same as Spain); *Mexico* (1854 Code Com. Art. 223); *Guatemala, Honduras and Paraguay* (1774 Orde. Bilbao ch. 13 § 2); *Russia* (1832 Exch. Law Art. 543); *Salvador* (1855 Code Com. Arts. 381, 510); *Spain* (1829 Code Com. Art. 426); *Switzerland* (1805 Zurich § 1; 1863 Basle § 3; 1859 Berne § 3).

² *Alabama Coal Mining Co. v. Brainard*, 35 Ala. 476 (1860).

³ *Taber v. Cannon*, 8 Mete. 456 (1844). In such case an acceptance by the agent alone in his individual name renders him alone liable.

⁴ *Tassey v. Church*, 4 Watts & S. 346 (1842). In this case an acceptance by "J. T., administrator," of a bill drawn on him in like manner, was held to render him personally liable. But the contrary has been held of a similar acceptance by "N. D., agent of the Com. Co.," of a bill drawn on him in that form, *Shelton v. Darling*, 2 Conn. 435 (1818). For fuller consideration of the personal responsibility of an agent as acceptor, see section I. of this chapter.

⁵ *Bruce v. Lord*, 1 Hilt. 247 (1856). Here the acceptance, "J. P. L., treasurer N. M. Co.," rendered J. P. L. *prima facie* personally liable. The draft was drawn on J. P. L. simply.

⁶ *Nicholls v. Diamond*, 9 Exch. 154 (1853). In the language of Alderson, B.: "He chooses to accept them for himself and others. He had no right to accept them for the other persons, but it is not the less a good acceptance as against him." In this case a draft on "J. D., purser W. D. Mining Co.," was accepted, "J. D., per proc. W. D. Mining Co.," the company being an unincorporated one, and J. D. was held personally on his acceptance.

⁷ *Okell v. Charles*, 34 L. T. (N. S.) 822 (1876).

⁸ *Hascall v. Life Association*, 5 Hun 151 (1875). So, an acceptance by a firm in its right name of a bill drawn on it in a wrong name is a good acceptance, *Lloyd v. Ashby*, 2 B. & Ad. 23 (1831).

⁹ *Chitty* 189; *Jackson v. Hudson*, 2 Campb. 447; *Davis v. Clarke*, 6 Q. B. 16; *S. C.*, 13 L. J. Q. B. 305.

John & Jeremiah Naylor & Co., so as to hold the drawer, although they were intended by him.¹ But a bill may be directed to A., "or, in his absence, to B.," and accepted by A., and it will be sufficient to declare on such acceptance without taking any notice of B.² Again, a bill may be drawn on several persons and accepted by only part of them, and may then be described, in a declaration against those who accepted, as drawn on, and accepted by, them only.³ And if a bill be drawn upon, and accepted by, a partnership in its firm name, it will bind all partners, whether ostensible or secret, but the holder need only sue those who were known to him as such when he took the bill.⁴ We have seen that an omission of the drawee's name may be supplied by the acceptance. Where, however, a bill is indorsed before delivery and delivered with a blank left for the drawee and acceptor, the indorser cannot be changed into an acceptor without material alteration.⁵ But a bill may be addressed "at" instead of "to" the drawee without impairing its validity.⁶ And it may even be directed to a particular house instead of to the drawee by name.⁷

Sometimes an instrument in the form of a promissory note is addressed to, and accepted by, some third person, and a question then arises whether such instrument is a bill or

¹Grant *v.* Naylor, 4 Cranch 224 (1808). As to this case Marshall, C. J., says, p. 235: "If it be a case of mistake, it is a mistake of the writer only, not of him by whom the goods were advanced and who claims the benefit of the promise. * * * The company to which it is delivered are not imposed upon with respect to the address, but knowing that the letter was not directed to them, they trust the bearer, who came to make contracts on his own account. In such a case the letter itself is not a written contract between D. G., the writer, and John and Jeremiah Naylor, the persons to whom it was delivered. To admit parol proof to make it such a contract is going further than courts have ever gone, where the writing is itself the contract, not evidence of a contract, and where no pre-existing obligation bound the party to enter into it."

²Chitty 188; Story on Bills § 58; Byles 90; 12 Mod. 447.

³Story on Bills § 58; Mountstephen *v.* Brooke, 1 B. & Ald. 224 (1818).

⁴De Mautort *v.* Saunders, 1 B. & Ad. 398 (1830).

⁵Mahone *v.* Central Bank, 17 Ga. 111 (1855).

⁶Shuttleworth *v.* Stephens, 1 Campb. 407 (1808); Allan *v.* Mawson, 4 *Ib.* 115 (1814); Rex *v.* Hunter, Russ. & R. C. C. 511.

⁷Atwood *v.* Griffin, Ry. & Mood. 423. So, a memorandum, "Payable at No. 1 Wilmot St.," Gray *v.* Milner, 8 Taunt. 739; S. C., 3 Moore 90.

note. It may be treated by the holder at his option as either.¹ The acceptor of such an instrument is liable as the acceptor of a bill of exchange;² and the drawer remains liable as the maker of a note.³

§ 172. **Drawer and Drawee One Person—So Drawee and Payee.**—A bill of exchange is valid at common law, although drawn by the drawer upon himself. Such a bill is in all essentials a promissory note and may be treated as such.⁴ And the same thing is true of a bill drawn by a principal on his agent,⁵ or by the directors of a company on its cashier.⁶ Such a bill may also be regarded as an accepted bill of exchange,⁷ and no notice of non-acceptance is necessary in order to hold the drawer.⁸ Neither is a notice of dishonor necessary in such case, but it seems that a demand of payment must be made.⁹ In like manner a bill drawn on a

¹ *Edis v. Bury*, 6 B. & C. 433 (1827).

² *Lloyd v. Oliver*, 18 Q. B. 471 (1852).

³ *Brazelton v. McMurray*, 44 Ala. 323 (1870).

⁴ *Bytes* 90; 1 *Daniel* 134; 1 *Parsons* 62; *Chitty* 188; *Block v. Bell*, 1 M. & Rob. 149; *Starke v. Cheesman*, Carth. 509; *Dehors v. Harriot*, 1 Show. 163; *Robinson v. Bland*, 2 Burr. 1077; *Miller v. Thomson*, 3 Man. & G. 576; *Hasey v. White Pigeon B. S. Co.*, 1 Dougl. 193 (Mich. 1843); *Bailey v. S. W. R. R. Bank*, 11 Fla. 266 (1866); *Fairchild v. Ogdensburgh R. R.*, 15 N. Y. 337 (1857); *Commonwealth v. Butterick*, 100 Mass. 12 (1868). So, after acceptance, *Wetumpka, &c., R. R. Co. v. Bingham*, 5 Ala. 657 (1843). And the effect is the same where a bill is drawn by a firm in London on its house in Liverpool, *Miller v. Thomson*, *supra*; *Williams v. Ayers*, L. R. 3 App. Cas. 133 (P. C. 1877).

⁵ *Hardy v. Pilcher*, 57 Miss. 18 (1879); *Wardens, &c., St. James Church v. Moore*, 1 Ind. 289 (1848). This was the case of a draft by the Secretary on the Treasurer of the church corporation.

⁶ For examples treated as notes, see *Fairchild v. Ogdensburgh R. R.*, 15 N. Y. 337 (1857); *Mobley v. Clark*, 28 Barb. 390 (1858); *Tripp v. Swanzev Mfg. Co.*, 13 Pick. 291 (1832); *Indiana, &c., R. R. Co. v. Davis*, 20 Ind. 6 (1863); *Chicago, &c., R. R. Co. v. West*, 37 *Ib.* 216 (1871); *Allen v. Sea, &c., Assurance Co.*, 9 C. B. 574 (1850). For examples treated as bills, see *Burnheisel v. Field*, 17 Ind. 609 (1861); *Wetumpka, &c., R. R. Co. v. Bingham*, 5 Ala. 657 (1843).

⁷ 1 *Daniel* 134; *Cunningham v. Wardwell*, 12 Me. 466 (1835). Or it may be treated as a promissory note or an accepted bill at the holder's option, *Planters' Bank v. Evans*, 36 Tex. 594 (1871); *Randolph v. Parish*, 9 Porter 76 (1839).

⁸ *Roach v. Ostler*, 1 M. & Ry. 120 (1827). But it must be proved in order to sustain a recovery on a count in the declaration describing the drawee as a different person from the drawer of the same name, *Ib.*

⁹ 1 *Daniel* 134; *Kaskaskia Bridge Co. v. Shannon*, 6 Ill. 15 (1844); *Lyell v. Supervisors*, 6 McLean 446 (1855); *Mobley v. Clark*, 28 Barb. 390 (1858); *Dennis v. Table Mtn. Water Co.*, 10 Cal. 369 (1858). But *contra*, as to necessity for demand, *Indiana, &c., R. R. Co. v. Davis*, 20 Ind. 6 (1863).

fictitious drawee may be treated as a promissory note, on which the drawer may be held liable without demand of payment or notice of dishonor.¹ And a bill of exchange is also valid, although the person named in it as payee be also the drawee.² In France the drawer of a bill of exchange cannot by the Code Napoleon be the drawee, although this was permitted by the earlier Exchange Law of 1673.³ And this is also prohibited by statute in Denmark and Hungary.⁴ In some other foreign States it is expressly permitted by statute.⁵ And in Switzerland it is permitted, if the bill be drawn upon another place.⁶

¹*Smith v. Bellamy*, 2 Stark. 223 (1817). In this case an accepted bill was delivered to the plaintiff, who failed to find the acceptor and was non-suited for want of proof of presentment. But it was held that he might have charged and held the drawer for drawing a bill on a person who was not in existence.

²*Chitty* 33; *Holdsworth v. Hunter*, 10 B. & C. 449 (1830); *Wilder v. Savage*, 1 Story C. C. 29 (1839); *Commonwealth v. Butterick*, 100 Mass. 12 (1868). Or it may be payable to the "order of the acceptor," *Witte v. Williams*, 8 So. Car. 290 (1876). And an instrument in which drawer, drawee and payee are all one person may be properly described as a bill of exchange in an indictment for forgery, *Commonwealth v. Butterick*, *supra*.

³*Bedarride Droit Com.* Vol. I. p. 94.

⁴*Denmark* (1825 Exch. Law § 2); *Hungary* (1844 Exch. Law Art. 15) as to drafts.

⁵*Austria* (1850 Exch. Law Art. 6); *Germany* (1848 Exch. Law Art. 6); *Italy* (1865 Code Com. Art. 197); *Sweden and Norway* (1851 Exch. Law ch. 1 § 2).

⁶*Switzerland* (1859 Berne § 6; 1863 Basle § 6).

CHAPTER VI.

FORM—WORDS RELATING TO TRANSFER,
CONSIDERATION, &c.*I. Negotiable Words.**II. Expression of Consideration.**III. Blanks.**IV. Memoranda and Contemporaneous Agreements.**V. Additional Stipulations.*

I. NEGOTIABLE WORDS.

173. Negotiability—What it is.

174. Order—Bearer—How far Necessary.

175. "Bearer"—"A. or Bearer."

176. Negotiability—Enlarged or Restricted.

177. Non-negotiable Instruments.

§ 173. **Negotiability—What it is.**—The word "negotiable" is often used to signify merely that a contract or instrument is assignable. In a more restricted sense it may mean that an instrument is assignable and may be sued by the assignee in his own name.¹ Its proper commercial sense is still more restricted, and when applied in this sense to commercial paper, it means not only that the negotiable instrument may be assigned and that the assignee may bring an action on it in his own name, but also that such assignment shall be subject to no equities between prior parties, and that out of the assignments or transfers of the paper shall grow an orderly commercial relation and liability between the holder and all persons whose names are on the paper. It is in this sense that commercial paper is said to be "negotiable" or "non-negotiable." Negotiability is not necessary to the

¹"The term 'negotiable,' in its enlarged signification, applies to any written security which may be transferred by indorsement or delivery, so as to vest in the indorsee the legal title so as to enable him to maintain a suit thereon in his own name," Scott, J., in *Odell v. Gray*, 15 Mo. 337 (1851).

existence of a valid bill of exchange, note or check, although this was at one time doubted.¹ And where an action is brought on a lost note there is not even a presumption of its having been negotiable in form, and this must be proved by the plaintiff.²

§ 174. "Order"—"Bearer"—How far Necessary to Negotiability.—The negotiability of an instrument is generally indicated by the words "or order," "or bearer," after the name of the payee. It is also frequently expressed by the forms, "Pay to the order of A. B.," "Pay to bearer." It is sometimes said that the word "order" or "bearer" is essential to negotiability.³ The rule more correctly stated is that these words *or their equivalent* are necessary for that purpose.⁴ No particular words are necessary, provided the intention of the instrument is clear.⁵ It is said by Mr. Justice Story that the word "assigns" is sufficient.⁶ But in England a corporation bond payable "to A. and B., their

¹ Chitty 182; 1 Daniel 114; 1 Edwards § 199; Wells v. Brigham, 6 Cush. 6 (1850); Smith v. Kendall, 6 T. R. 123, 1 Esp. 231; Rex v. Box, 6 Taunt. 328; Goshen Turnpike Co. v. Hurtin, 9 Johns. 217 (1812); Duncan v. Maryland Sav. Bank, 10 Gill & J. 299 (1838); Downing v. Backenstoos, 3 Cai. 137 (1805); Kendall v. Galvin, 15 Me. 132 (1838); Sibley v. Phelps, 6 Cush. 173; Courstin v. Ledlie, 31 Penna. St. 506 (1858).

² Yingling v. Kohlhas, 18 Md. 148 (1861).

³ Byles 85; 2 Parsons 45; Fernon v. Farmer, 1 Harr. 32 (Del. 1832); Roe v. Hallett, 20 N. Y. Weekly Dig. 34 (1884). And, it seems, this is also the rule as to bills of lading, Henderson v. Comptoir d' Escompte, L. R. 5 P. C. 253.

⁴ Story on Bills § 60; Chitty 225; 1 Edwards § 194; Hill v. Lewis, 1 Salk. 132; Noland v. Ringgold, 3 Harr. & J. 216 (1811); Huntington v. Harvey, 4 Conn. 124 (1821); Backus v. Danforth, 10 Ib. 297 (1834); Lyon v. Summers, 7 Ib. 399 (1829); Bank of Sherman v. Apperson, 4 Fed. Rep. 25 (1880); Smurr v. Forman, 1 Ohio 272 (1824); Parker v. Riddle, 11 Ib. 102 (1841); Hackney v. Jones, 3 Humph. 612 (1842); Albright v. Griffin, 78 Ind. 182 (1881); Sinclair v. Johnson, 85 Ib. 527 (1882). But see, *contra*, Whiteman v. Childress, 6 Humph. 307 (1845); Porter v. City of Janesville, 3 Fed. Rep. 617 (1880); Fawsett v. National Life Ins. Co., 97 Ill. 11 (1880), by force of Illinois statute. The addition of the words "or bearer," therefore, constitutes a material alteration, McCauley v. Gordon, 64 Ga. 221 (1879).

⁵ Chitty 183, 226; 1 Daniel 115; 1 Edwards § 194; Story on Prom. Notes § 44; Raymond v. Middleton, 29 Penna. St. 529 (1858); United States v. White, 2 Hill 59 (1841).

⁶ Story on Bills § 60; Story on Prom. Notes § 44. Thus a coupon bond payable to a blank payee, "his executors, administrators and assigns," has been held to be negotiable, Dutchess County Ins. Co. v. Hachfield, 1 Hun. 675 (1874). But not so a note to the trustees of a church "or their collector," Noxon v. Smith, 127 Mass. 485 (1879).

executors, administrators or assigns, or to the bearer hereof," was held to be assignable clear of prior equities *in equity only*.¹ And a like bond payable "to C. or his executors, administrators or transferees, or to the holder for the time being," was held to be non-negotiable and subject to equities.² But a note payable to "A. or holder," is equivalent to one payable to "A. or bearer" and is negotiable.³ And the interposition of a word of description, as "to A. B., *trustee*, or order," does not affect the negotiability of the instrument.⁴ It seems, too, that words of negotiability are unnecessary in a bill or note held by the king or by the government.⁵

Such words seem generally to be required by statute in the

¹*In re Blakely Ordnance Co.*, L. R. 3 Ch. 154 (1867).

²*In re Natal Investment Company*, L. R. 3 Ch. 355 (1868). Lord Chancellor Cairns says of these words (p. 360): "The covenant is made with him. The payment is to be to him or his executors, administrators or transferees. Stopping at that point, the word 'transferees' would obviously be simply equivalent to 'assigns,' and 'assigns' would mean, according to the ordinary construction of such an instrument, an assign by deed—an assign in a way in which an assignee of a bond or other chose in action of the same kind is created. The executors and the administrators would be subject, if the claim for payment were made by them, to any equities which might exist against Coqui himself. So, also, assignees or assigns by deed would be subject to the same equities. There is nothing, therefore, in the debenture up to that point which would negative the usual rule of equity, that the assignee must take subject to all the equities between the original parties to the contract. We then find added these words, after the word 'transferees,' 'or to the holder for the time being of this debenture.' As I understand those words, they do nothing more than this: in order to save the trouble and expense of assignments by deed, they provide that the company will recognize any person who holds the debenture to be in as good a position as if he had become the assign of it by deed, and will not insist upon his proving his title by producing a formal assignment; but there is nothing whatever in these words which, as it seems to me, is intended to put the holder for the time being in a better position than an assignee by deed. It would be in the highest degree unreasonable to suppose that an assign by the most formal mode of assignment would take subject to the equities against Coqui, whereas an assign, not by deed but by merely manual transfer of the document, would take free from those equities." Sir R. Malins, V. C., however, in commenting on this opinion two years later, *In re Imperial Land Co.*, L. R. 11 Eq. 493, says: "I am unable to see any distinction between 'payable to bearer' and 'to the holder for the time being.'"

³*Putnam v. Crymes*, 1 McMull. 9 (1840).

⁴*Bush v. Peckard*, 3 Harr. 385 (Del. 1841).

⁵Story on Bills § 60. And, therefore, the assignment of a non-negotiable note to the United States will vest the legal title in the government, *United States v. White*, 2 Hill 59 (1841); *United States v. Buford*, 3 Pet. 12. So, the government can take legal title to a note payable to A. B., by operation of law without indorsement, *Lambert v. Taylor*, 4 B. & C. 151 (1825).

United States.¹ And the Irish law on the subject now corre-

¹Such words are not necessary to negotiability in *Colorado*, Thackeray v. Hanson, 1 Col. 365 (1871).

In *California* a negotiable instrument must be "to order or bearer" (Civ. Code of 1872 § 8087); "or words equivalent thereto" (*Ib.* § 8101).

In *Connecticut* negotiable promissory notes must be "payable to any person or his order or to bearer" (Act of 1811; Gen. St. Rev. 1875 p. 343 § 1). Until this act notes were not negotiable in Connecticut, 2 Root 524.

In *Dakota* the above-mentioned provisions of the California Code have been copied (Rev. Code 1877 §§ 1821, 1832).

In *Delaware* "all bonds, specialties and notes in writing payable to any person or order or assigns" may be assigned or indorsed and sued upon by the assignee in his own name (Rev. Code 1852 and 1874 c. 63 § 8).

In *Georgia* a promissory note is defined as "a promise made by one or more to pay to another or order or bearer," &c. (Code 1873 §§ 2774, 2776).

So, in *Idaho* (Rev. L. 1875 p. 652 § 1).

In *Illinois* notes and bills payable to any person named as payee therein are transferable by indorsement (1845 R. S. p. 334; 1880 R. S., Hurd's Ed., c. 98 § 3).

In *Indiana* only such notes as are payable to order or bearer and in an Indiana bank, are negotiable clear of defense (2 R. S. 1876, Davis' Ed., c. 177 § 6). Inland, and of course foreign, bills of exchange are governed by the same rule (*Ib.* § 5).

In *Iowa* promissory notes for the payment of a sum of money to be negotiable must be payable to the payee "or his order or bearer or to bearer only" (1880 Rev. Code § 2082). "Bonds, due-bills and all instruments in writing * * * to pay to another without words of negotiability a sum of money in property or labor" are assignable by indorsement subject to equities (*Ib.* § 2084). Bonds, bills, &c., "to pay a sum of money in property or labor or to pay or deliver property or labor" * * * are negotiable with all the incidents of negotiability whenever it is manifest from the terms that such was the intent of the maker, but the use of the technical words "order" or "bearer" alone will not manifest such intention (*Ib.* § 2085).

In *Kansas* negotiable words are necessary to the negotiability of bonds, bills and notes, and such instruments made "payable to any person alone and not drawn payable to any order, bearer or assigns" are not negotiable (1879 Comp. L. c. 14 § 1; 1881 Comp. L. 127 § 1; 1859 P. L. 71).

In *Kentucky* notes "payable to any person or persons or to a corporation," if payable at certain banks, are placed on the footing of foreign bills (1881 G. S. c. 22 § 21).

In *Maryland* the statute of Anne is still in force (Bill of Rights Art. V.; Alexander's British Statutes p. 649).

In *Massachusetts* bonds and other obligations of corporations and joint stock companies for the payment of money to order or to bearer, or to a designated person or bearer, are negotiable (1859 G. S. c. 53 § 6).

In *Michigan* promissory notes for the payment of money to any person "or his order, or to the order of any other person or unto the bearer," are made negotiable (1 Comp. L. 1871 p. 515 § 1).

In *Mississippi* promises for the payment of money or of any other thing "whether payable to order or assigns or not," are made assignable subject to equities (1880 Rev. Code § 1124; 1871 R. C. § 2228).

In *Missouri* negotiable notes must be "to a payee therein named or order or bearer" (1 R. S. 1879 c. 10 § 547; 1872 ed. Wagner p. 216 § 15).

In *Nebraska* negotiable instruments must be drawn payable "to order, bearer or assigns" (1873 G. S. c. 32 § 1; 1866 R. S. § 27).

In *Nevada* only notes which are payable "to any other person (than the maker) or to his order, or to the order of any other person or unto the bearer," and those which are negotiated by the maker payable to his own

sponds with that of England.¹ But the law of Scotland does not require the words "or order" in a bill of exchange to render it transferable by indorsement.² In other foreign countries it is required by statute that such words or their equivalent be used.³ Making an instrument payable "to the order of

order or to that of a fictitious person, are made negotiable (1 Comp. L. 1873 c. 5 § 9; 1861 P. L. p. 4).

In *New Jersey* the statute relating to negotiable notes includes only those payable to another person (than the maker) or order or bearer (1795 Pat. Rev. p. 342 § 4; 1874 Rev. p. 897 § 1).

So, in *New York* (2 R. S., ed. 1875, p. 1160 § 1; 1 R. L. 1801 p. 151).

In *North Carolina* negotiable instruments may be "expressed or not to be to order" (1873 Bat. Rev. c. 10 § 1).

In *Ohio* they must be payable to order, bearer or assigns (1880 R. S. § 3171; 1830 P. L. p. 217 § 1).

In *Pennsylvania* negotiable notes dated in Philadelphia under the act of 1797 must be payable "to the order of the payee" (1872 Purd. Dig. p. 1173 § 1); so, too, all bills, notes, drafts, checks, &c., drawn or indorsed in Pennsylvania payable elsewhere (1872 Purd. Dig. p. 1173 § 2; 1849 P. L. p. 427 § 11). Other bills, notes, &c., seem to have been left to the rule of the common law.

In *Rhode Island* negotiable notes must be payable to order or bearer (1872 G. S. c. 129 § 6).

In *South Carolina* likewise (1873 R. S. p. 319 § 8).

In *Tennessee* only notes payable "to any other person (than the maker) or order, or to the order of any other person," are made negotiable by the statute (1871 C. S. § 1956; 1762 P. L. c. 7 § 2). But see *Whiteman v. Childress*, 6 Humph. 307 (1845).

In *Vermont* negotiable bills and notes must be payable to a person or order or bearer (1862 G. S., ed. 1870, p. 508 § 5).

So, in *Wisconsin* (1878 R. S. § 1675). In this State it is further provided that no order drawn on the treasurer of a municipal corporation and no instrument executed by a corporation shall be negotiable "unless expressly authorized by law to be made negotiable" (1878 R. S. § 1675); and that warehouseman's receipts shall be negotiable unless "not negotiable" is written on them (*Ib.* § 1676).

¹9 Geo. IV. c. 24 § 2; Chitty 225.

²Chitty 183, 225; Thompson on Bills 101; 1 Edwards § 198.

³Chitty 225; 1 Pardessus 346, 358. But a Bank of England note payable to bearer and transferred by delivery in France, is sufficiently transferred to vest the legal title in the holder, *De la Chaumette v. Bank of England*, 2 B. & Ad. 385 (1831). See, also, 9 B. & C. 208, s. c.

The Code Napoleon (§ 110) requires a bill of exchange to be drawn to the order of a third person or of the drawer. This law applies to *France, Hayti,reece, San Domingo, Canton of Geneva and Turkey*.

In *Spain* no order or promise to pay is a commercial contract without being drawn to order (1829 Code Com. Art. 570). If drawn in favor of the bearer and no payee named, it is the foundation of no liability or action at law (Art. 572). But a bill of exchange may be drawn to the order of the drawer, with a statement of consideration to be received by himself (Art. 430).

So, too, in *Colombia* (1853 Code Com. Arts. 388, 524, 526);

Costa Rica (1853 Code Com. Arts. 377, 517, 519);

Ecuador (Code Com. 1829, same as that of Spain);

Mexico (1854 Code Com. Arts. 325, 449, 452);

Peru (1853 Code Com. Arts. 387, 531, 533).

In *Uruguay* negotiable drafts, bills of exchange, indorsements and prom-

A.," has the same effect as making it "to A. or his order."¹ Making it payable simply "to order" is equivalent to making it payable to a fictitious person and hence to bearer.²

§ 175. "**Bearer**"—**Transferable by Delivery**.—Commercial paper payable to bearer is negotiable by delivery;³ and an action will lie in the name of any holder. This is true of a check as well as a bill of exchange or note.⁴ An instrument payable to "A. or bearer," is equivalent to one made payable

issory notes must all be to order (1865 Code Com. Arts. 790, 824, 933); but due-bills, promissory notes and other instruments for the payment of money to the bearer are transferable by delivery (*Ib.* 933).

To be transferable by indorsement a bill of exchange must be drawn to "order" in the *Argentine Republic* (Code Com. 1862 Art. 777, or, it may be, to the order of bearer, *Ib.* 781—and so as to promissory notes, *Ib.* 916);

Bolivia (Code Com. 1834 §§ 460, 461);

Venezuela (Code Com. 1862 Art. 2);

Brazil (Code Com. 1850 Art. 354), and it must appear whether it is payable to order and to whose order;

Chili (Code Com. 1865 Art. 634); but "to the rightful owner," "to the disposition of," &c., or other equivalent words will do as well, drafts and notes between merchants being excepted from the requirement of such words.

In *Denmark* a bill may be drawn to the order of 'a third person or of the drawer, or to the bearer (Exch. Law 1825 §§ 5, 6).

In *Germany* (Exch. Law 1848 Art. 9) and *Austria* (Exch. Law 1850 Art. 9) provision can be made against the negotiating of a bill of exchange by the words "not to order" or other equivalent words.

In *Holland* only instruments payable to order are made negotiable by indorsement (Exch. Law 1838 Art. 133).

In *Hungary* the words "or order" after the payee's or indorsee's name are requisite to its negotiability (Exch. Law 1860 §§ 15, 31).

In *Italy* a bill of exchange is either payable to the order of a third person or of the drawer (1865 Code Com. Art. 196).

In *Nicaragua* a draft must be payable "to order" or "to indorsement" (Code Com. 1869 Art. 315).

In *Portugal* bills of exchange, not drawn to "order," are mere evidences of debt (1833 Code Com. Art. 425); so, too, inland bills and promissory notes (*Ib.* 428, 437). But a letter of credit can only be made payable to a particular person and not to order (*Ib.* 445).

In *Sweden* and *Norway* bills of exchange are transferable without negotiable words (1851 Exch. Law ch. 1 § 11).

¹*Huling v. Hugg*, 1 Watts & S. 419 (1841); *Howard v. Palmer*, 64 Me. 86 (1874); *Durgin v. Bartol*, *Ib.* 473. And a bill drawn payable to the order of the drawer is payable to the drawer and can be sued upon by him after its acceptance, *Smith v. McClure*, 5 East 476 (1804); *Frederick v. Colton*, 2 Show. 8.

²*Davega v. Moore*, 3 McCord 482 (1826). But it seems that an indorsement, "pay the amount to order for my use," destroys the negotiability of a note, *Brown v. Jackson*, 1 Wash. C. C. 512 (1806).

³*Cobb v. Duke*, 36 Miss. 60 (1858). For cases on this subject, see chapter on Transfer, *infra*.

⁴*Keene v. Beard*, 8 C. B. (N. S.) 372 (1860).

to bearer.¹ Formerly such instruments were thought not to be negotiable, because they contained no authority to make assignment.² They are now, however, held to be negotiable as fully as if payable to "order."³ But in some States they are assignable by indorsement only.⁴ The word "bearer," if used merely as description of a payee named in the instrument, *e. g.* "to the bearer, A.," adds no force, negotiable or otherwise, to the name, and the instrument is one payable to A. only and not negotiable.⁵

§ 176. **Negotiability—Enlarged or Restricted.**—The negotiable character of an instrument, as shown upon its face, is sometimes enlarged by the terms of an indorsement. Thus, a note payable to A. "or order," being afterwards indorsed payable to B. "or bearer," is thereby rendered transferable by delivery.⁶ But if originally negotiable, it will not be rendered non-negotiable by a special indorsement to A. B., or to A. B. "at his own risk."⁷ Although, in the latter case at least, the indorser would not be liable on his indorsement.⁸ So, a negotiable note is not rendered non-negotiable by the indorsement of a non-negotiable guaranty upon it;⁹ nor,

¹ Byles 85; 1 Daniel 114; 1 Edwards § 194; *Grant v. Vaughan*, 3 Burr. 1516; *Bullard v. Bell*, 1 Mason 252 (1817).

² Chitty 225; 1 Daniel 114; *Horton v. Coggs*, 3 Lev. 299; *Hodges v. Steward*, 1 Salk. 125; *Nicholson v. Sedgwick*, 1 Ld. Raym. 180.

³ Chitty 225; 1 Edwards § 194; *Bullard v. Bell*, 1 Mason 252 (1817); *Hutchings v. Low*, 1 Green 246 (N. J. 1832); *Tillman v. Ailles*, 5 Sm. & M. 373 (1845); *Mathews v. Hall*, 1 Vt. 317 (1828); *Greencaux v. Wheeler*, 6 Tex. 515 (1851); *Hopkins v. Seymour*, 10 *Ib.* 202 (1853).

⁴ *Garvin v. Wiswell*, 83 Ill. 215 (1876); 3 Gross. Stats. 1869 p. 461 § 4; 1880 R. S. Hurd's Ed. c. 98 § 3. So, too, in Ohio, *Avery v. Latimer*, 14 Ohio 542 (1846); *Fallis v. Howarth*, Wright 303 (1833); *Laws* 1820 p. 217. So, too, in Alabama, where, however, the statute (1837) did not extend to then existing instruments, *Sprowl v. Simpkins*, 3 Ala. 515 (1842). In Kansas such instruments were formerly subject to defense when transferred by indorsements, *Blood v. Northrup*, 1 Kans. 28; 1855 P. L. 155; but this is now true only of indorsements after maturity, 1859 P. L. 71; 1881 Comp. L. 127 § 2. In Illinois instruments payable to bearer may be transferred by delivery, *Gross. Stats.* 1874 p. 293 § 8; 1880 R. S. c. 98 § 8.

⁵ *Warren v. Scott*, 32 Iowa 22 (1871).

⁶ *Shelton v. Sherfey*, 3 Iowa 108 (1851).

⁷ *Rice v. Stearns*, 3 Mass. 225 (1807); *Leavitt v. Putnam*, 3 N. Y. 494 (1850), reversing 1 Sandf. 199.

⁸ *Rice v. Stearns*, 3 Mass. 225 (1807).

⁹ 2 Parsons 135; *Upham v. Prince*, 12 Mass. 14 (1815). And see *Taylor v. Binney*, 7 *Ib.* 479 (1811).

e converso, is a non-negotiable guaranty made negotiable by a negotiable indorsement.¹ And it has been held that an agreement by the payee of a note not to sell it, indorsed on a note, is not part of it and cannot defeat the holder's right to recover.² But where a note payable to A. or order is assigned by delivery without indorsement, it passes subject to equities.³

§ 177. **Non-negotiable Instruments.**—A bill of exchange or other commercial instrument, as has been seen, may be made payable only to the payee named in it. In such event it is non-negotiable, but constitutes a perfectly valid obligation between the original parties.⁴ It is also now generally assignable at law, and always was so in equity.⁵ And in some States, at least, the assignee of such instrument may sue upon it in his own name.⁶ Indeed, as affecting the relation of the original parties to one another, the words "or order" are so immaterial that their omission in pleading is of no consequence.⁷

But, in general, where words of negotiability are wanting, the indorsee or assignee takes the instrument subject to equi-

¹Fell on Guaranty, &c., 298; 2 Parsons 133; *Hayden v. Weldon*, 14 Vroom 128 (1881); *Miller v. Gaston*, 2 Hill 192 (1842); *Lamourieux v. Hewit*, 5 Wend. 307 (1830); *Leggett v. Raymond*, 6 Hill 639 (1844), the guarantor being held in this case as an indorser; *True v. Fuller*, 21 Pick. 140 (1838); *Tuttle v. Bartholemew*, 12 Metc. 452 (1847); *Belcher v. Smith*, 7 Cush. 482 (1851); *McDoal v. Yeomans*, 8 Watts 361 (1839). It is said, however, by Chancellor Walworth that "a guaranty indorsed upon a negotiable note, whereby the guarantor agrees with the holder of the note that he will be answerable that the note shall be paid to him, or to his order, or the bearer thereof, when it becomes due is probably negotiable by the transfer of the note upon which it is written," *McLaren v. Watson*, 26 Wend. 430 (1841). So, too, *Ketchell v. Burns*, 24 Ib. 456 (1840).

²*Leland v. Parriott*, 35 Iowa 454 (1872). But an indorsement, "This note is not transferable," has been held to destroy its negotiability, *Friedman v. Wagner*, 1 Tex. App. 734 (1879).

³*Jones v. Witter*, 13 Mass. 305 (1816).

⁴*Byles* 85; 1 *Daniel* 115; 1 *Edwards* § 199; *Smith v. Kendall*, 6 T. R. 123; *Rex v. Box*, 6 Taunt. 325. And it may be declared on as a note, *Downing v. Backenstoos*, 3 Caines 137 (1805).

⁵*Halsey v. De Hart*, Coxe 93 (1791); *Maxwell v. Goodrum*, 10 B. Mon. 286 (1850).

⁶*Goodman v. Fleming*, 57 Ga. 350 (1876). Subject, however, to any defense arising out of original want of consideration, *Cohen v. Prater*, 56 Ga. 203 (1876).

⁷*Maxwell v. Goodrum*, 10 B. Mon. 286 (1850).

ties existing between the original parties.¹ In substance, therefore, the only liability of maker or drawer is what he originally assumed toward the payee named by him.² And an indorsement of a non-negotiable instrument by the payee will not render it negotiable;³ nor give the indorsee an action against prior parties;⁴ although it will render such indorser liable to his indorsee;⁵ and will, if he use fit words in the indorsement, render him liable to all subsequent indorsees.⁶

Without words of negotiability a note may still, by the Statute of Anne, be entitled to grace.⁷ But as to this a different rule has been followed in Connecticut.⁸ An omission of the words "or order" by mistake may be corrected, and in England the omitted words may be inserted without stamping the instrument afresh.⁹

Sometimes commercial paper is drawn "negotiable" at a particular bank or other place. This is held to authorize payment by the bank clear of any set-off that the maker or drawer might have.¹⁰ But making it payable and negotiable

¹ *Dyer v. Horner*, 22 Pick. 253 (1839); *Sanborn v. Little*, 3 N. H. 539 (1826); *Wiggins v. Damrell*, 4 *Ib.* 69 (1827).

² *Hill v. Lewis*, 1 Salk. 132; *Hackney v. Jones*, 3 Humph. 612 (1842); *Fernon v. Farmer*, 1 Harr. 32 (Del. 1832); *Warren v. Scott*, 32 Iowa 22 (1871); *Reed v. Murphy*, 1 Ga. 236 (1846); *Hosford v. Stone*, 6 Neb. 380 (1877); *Maule v. Crawford*, 14 Hun 193 (1878); *Backus v. Danforth*, 10 Conn. 297 (1834); *Noland v. Ringgold*, 3 Harr. & J. 216 (1811).

³ *Gregg v. Johnson*, 37 Tex. 558 (1872).

⁴ *Chitty* 183; 1 *Daniel* 115; *Douglass v. Wilkeson*, 6 Wend. 637 (1831); *Pratt v. Thomas*, 2 Hill 654 (So. Car. 1835); *Barriere v. Nairac*, 2 Dall. 249 (1796); *Gerard v. La Coste*, 1 *Ib.* 194 (1787).

⁵ 1 *Daniel* 115; *Story on Bills* §§ 60, 199; *Hill v. Lewis*, 1 Salk. 132; *Sweetser v. French*, 13 Metc. 262 (1847). And see *Smurr v. Forman*, 1 Ohio 272 (1824).

⁶ *Chitty* 183, 226; *Codwise v. Gleason*, 3 Day 12 (1808); *Josselyn v. Ames*, 3 Mass. 274 (1807); *Seymour v. Van Slyck*, 8 Wend. 421 (1832). But to give such effect under the English Stamp Act a second stamp is now necessary there, *Chitty* 226; *Plimley v. Westley*, 2 Scott 423; S. C., 2 Bing. N. C. 249.

⁷ *Smith v. Kendall*, 6 T. R. 123; 1 Esp. 231; *Burchell v. Slocock*, 2 Ld. Raym. 1545; *Duncan v. Maryland Sav. Bk.*, 10 Gill & J. 299 (1838). And if the maker himself put such a note in circulation elsewhere, he cannot object to its being negotiated without regard to the restriction, *Wardell v. Hughes*, 3 Wend. 418 (1829).

⁸ *Backus v. Danforth*, 10 Conn. 297 (1834).

⁹ *Chitty* 183, 225; *Kershaw v. Cox*, 3 Esp. 246; *Knill v. Williams*, 10 East 495; *Cole v. Parkin*, 12 *Ib.* 471.

¹⁰ 1 *Daniel* 116; 1 *Edwards* § 195. "It would be a fraud on the bank to set up offsets against the note in consequence of any transactions between the

at such bank has in general no effect upon the question of its negotiability.¹ In Pennsylvania, however, a distinction has been made between a note “payable and negotiable without defalcation at the Kensington Bank” and one “negotiable and payable at,” &c., the former being held to be negotiable only if negotiated at the designated bank.² And in Kentucky it seems that a note is commercial paper only if made payable and negotiable at a bank and negotiated there.³

Other words and circumstances affecting the negotiability of an instrument are considered in other parts of this work. In considering the transfer of commercial paper hereafter it will be seen that the question of continued negotiability arises upon each change of ownership and is determined in general by the same rules which fix the original character of the paper. As used in this work the terms “bill,” “note” and “check,” relate to negotiable instruments, unless non-negotiable instruments are mentioned or clearly intended.

parties. These offsets are waived and cannot, after the note has been discounted, be again set up,” Marshall, C. J., in *Mandeville v. Union Bank*, 9 Cranch 9 (1815).

¹ Edwards § 195.

²*Raymond v. Middleton*, 29 Penna. St. 529 (1858).

³*Stapp v. Anderson*, 1 A. K. Marsh. 398 (1819). See, too, *Bell v. Morehead*, 3 *Ib.* 158 (1820); *Jones v. Wood*, *Ib.* 162 (1820).

II. EXPRESSION OF CONSIDERATION.

178. "Value Received"—Presumption.

179. Statutes as to Consideration.

180. Effect of "Value Received"—Pleading—Evidence.

§ 178. "Value Received"—Presumption.—The words "value received" are usually found in bills of exchange and promissory notes, and sometimes in drafts, to express the consideration. In a note these words can only refer to a consideration moving from the payee to the maker.¹ So, in the case of a bill of exchange payable to the order of the drawer, there can be no ambiguity, as the words can only mean value received by the acceptor from the drawer.² But in bills of exchange payable to the order of a person other than the drawer, the words may mean either a consideration moving from the payee to the drawer or from the drawer to the acceptor. Of these meanings the former is to be preferred.³

The words "value received" import a valid consideration.⁴ And even in the case of a guaranty they express a consideration sufficiently to satisfy the Statute of Frauds.⁵ But

¹Chitty 186; Story on Prom. Notes § 51; Clayton v. Gosling, 5 B. & C. 361; 8 D. & R. 110.

²Bytes 88; Chitty 186; Chalmer's Dig. 15; Highmore v. Primrose, 5 M. & S. 65 (1816). And if otherwise averred in the declaration in such case, it would be a variance, Highmore v. Primrose, *supra*.

³Bytes 88; Chitty 185; Grant v. Da Costa, 3 M. & S. 351, Lord Ellenborough saying in this case: "It appears to me that 'value received' is capable of two interpretations, but the more natural one is that the party who draws the bill should inform the drawee of a fact which he does not know, rather than one of which he must be well aware." So, Bayley, J., in the same case: "The object of inserting the words 'value received' is to show that it is not an accommodation bill, but made on a valuable consideration given for it by the payee."

⁴Chitty 185; Holliday v. Atkinson, 5 B. & C. 503; Thatcher v. Dinsmore, 5 Mass. 299 (1809); Delano v. Bartlett, 6 Cush. 364 (1850); Mandeville v. Welch, 5 Wheat. 277 (1820); Dugan v. Campbell, 1 Ohio 115 (1823); Hill v. Todd, 29 Ill. 101 (1862); Hoyt v. Jaffray, *Ib.* 104; Martin v. Hazard, 2 Col. 596 (1875); Sawyer v. Vaughan, 25 Me. 337 (1845); Stevens v. McIntire, 14 *Ib.* 14 (1836); Thompson v. Armstrong, 5 Ala. 383 (1843); Cox v. Slade, 2 Dev. 8 (1828). So, too, in non-negotiable notes, 1 Edwards § 202. So, too, in a contract for indemnity, Lapham v. Barrett, 1 Vt. 247 (1828).

⁵Miller v. Cook, 23 N. Y. 495 (1861); Watson v. McLaren, 19 Wend. 557 (1838); Douglass v. Howland, 24 *Ib.* 35 (1840); Cooper v. Dedrick, 22

they do not, at least in a non-negotiable note, import necessarily a cash consideration.¹ However usual, and however important they were once thought, they are at common law not essential to commercial paper,² and, in the absence of statutory requirements, may be safely omitted. At common law all commercial paper implies a consideration, although none be expressed by these or other words.³ And this has been held true even in the case of a note delivered in a sealed envelope with request that it be not opened until the maker's death, and indorsed with the words, "Please accept this from your true friend, A. B."⁴ Consideration is in like manner implied between indorsee and maker.⁵

But in the absence of such words no consideration is imported for the signature of a new maker added to the note after its delivery.⁶ Nor does the rule apply, in Pennsyl-

Barb. 516 (1856). And to the same effect, *obiter*, *Brewster v. Silence*, 8 N. Y. 207 (1853). But it is not conclusive so as to enable the holder to recover on a naked gift to him by the guarantor, *Vanderveer v. Wright*, 6 Barb. 547 (1849).

¹ Chitty 186; *Morgan v. Jones*, 1 Tyrw. 21.

² Byles 87; Chitty 79, 184; 1 Daniel 117; 1 Edwards § 202; 1 Parsons 193; Story on Bills § 63; Story on Prom. Notes § 51; *White v. Ledwick*, 4 Doug. 427; *Grant v. Da Costa*, 3 M. & S. 351; *Popplewell v. Wilson*, 1 Stra. 264; *Claxton v. Swift*, 2 Show. 496; *Macleod v. Snee*, Ld. Raym. 1431. For an early authority to the contrary, see *Cramlington v. Evans*, 1 Show. 5. See, also, *Banbury v. Lisset*, 2 Stra. 1212; 2 Bl. Com. 468. In *Germany* the rule is the same as in England and in the United States, Thöl. W. R. 143. In *New Hampshire* the omission of the words "value received" is said to create suspicion, *Harriman v. Sanborn*, 43 N. H. 128 (1861).

³ Byles 87; Chitty 184; 1 Daniel 117; 1 Edwards § 202; 1 Parsons 193; Story on Bills § 63; Story on Prom. Notes § 51; *Grant v. Da Costa*, 3 M. & S. 351; *Mandeville v. Welch*, 5 Wheat. 277 (1820); *Underhill v. Phillips*, 10 Hun 591 (1877); *Dean v. Carruth*, 108 Mass. 242 (1871); *Townsend v. Derby*, 3 Metc. 363 (1841); *Hughes v. Wheeler*, 8 Cow. 83 (1827); *President, &c., Goshen Turnpike v. Hurtin*, 9 Johns. 217 (1812); *Kimball v. Huntington*, 10 Wend. 680 (1833); *Kinsman v. Birdsell*, 2 E. D. Smith 395 (1854); *Hook v. Pratt*, 78 N. Y. 371 (1879); *Hubble v. Fogartie*, 3 Rich. 413 (1832); *Kendall v. Galvin*, 15 Me. 131 (1838); *Hanley v. Lang*, 5 Porter 154 (1837); *Matlock v. Livingston*, 9 Sm. & M. 489 (1848); *Murry v. Clayborn*, 2 Bibb 300 (1811); *Peasley v. Boatwright*, 2 Leigh 195 (1830); *People v. McDermott*, 8 Cal. 288 (1857); *Cook v. Gray*, Hempst. 84 (1829). Especially if the consideration be expressed by other equivalent words, *Bourne v. Ward*, 51 Me. 191 (1863). And a note without such words may be given in evidence under the money counts, *Townsend v. Derby*, 3 Metc. 363.

⁴ *Dean v. Carruth*, 108 Mass. 242 (1871). But see, *contra*, *Harris v. Clark*, 3 N. Y. 93 (1849).

⁵ *Mason v. Buckmaster*, 1 Ill. 27 (1820).

⁶ *Courtney v. Doyle*, 10 Allen 122 (1865); *Clopton's Exr. v. Hall*, 51 Mass. 482 (1875). And even where the note contains the words "value received,"

vania, to a sealed order for money.¹ And it appears to be confined in some States to negotiable paper.² While in Iowa all written contracts import a consideration, if signed by the maker.³ And the common law rule on this subject is changed by statute in some of the United States.⁴

§ 179. **Statutes as to Consideration.**—The English statutes providing for the protest of inland bills of exchange, relate only to bills “for value received,” but it seems that protest of inland bills was and still is unnecessary, and their force, in other respects, remains unaltered by the statutes above referred to.⁵ The Coal Act formerly required, under a penalty, that certain notes should contain the words “value received in coals,” but it seems that such notes were not rendered invalid by the omission of the words.⁶ And many foreign statutes require a particular statement of the consideration both in the bill and in the indorsement.⁷

if a new promisor signs it after its delivery, there must be evidence of a fresh consideration, *Green v. Shepherd*, 5 Allen 589 (1863).

¹ *Sidle v. Anderson*, 45 Penna. St. 464 (1863).

² Thus, in Massachusetts, an order payable to bearer, with no drawer named, was held not to import a consideration, *Ball v. Allen*, 15 Mass. 433 (1819). So, in Connecticut, as to non-negotiable instruments, *Edgerton v. Edgerton*, 8 Conn. 6 (1830); but not if the instrument be negotiable, *Bristol v. Warner*, 19 Conn. 7 (1848); *Camp v. Tompkins*, 9 *Ib.* 545 (1833).

³ *Jones v. Berryhill*, 25 Iowa 289 (1868).

⁴ In *Arkansas* no assignment of a promissory note need set forth the consideration (Rev. St. 1874 § 568). The words “value received” are, however, necessary to the recovery of certain statutory damages (*Ib.* § 556). In *California* every signature on a negotiable instrument “is presumed to have been made for a valuable consideration” (Civ. Code 1872 § 8104). Likewise in *Dakota* (Rev. Code 1877 § 1835). In *Missouri* the words “value received” must be expressed in a negotiable note (1835 R. C. 298 § 7; 1 R. S. 1879 c. 10 § 547). So, too, *Beatty v. Anderson*, 5 Mo. 447 (1838); *Macy v. Kendali*, 33 *Ib.* 164 (1862); *Stix v. Matthews*, 63 *Ib.* 371 (1876); *Bailey v. Smock*, 61 *Ib.* 213 (1875). In *North Carolina* negotiable instruments need not be expressed to be for “value received” (1873 Bat. Rev. c. 10 § 1). In *Pennsylvania* the act of 1797 (1872 *Purd. Dig.* p. 1173 § 1) requires negotiable notes “bearing date in the city or county of Philadelphia,” to be expressly “for value in account or for value received.”

⁵ *Chitty* 375; *Byles* 87; 3 and 4 Anne c. 9 § 4; 9 and 10 Wm. III. c. 17 § 1.

⁶ 3 Geo. II. c. 26 §§ 7, 8, now repealed; *Wigan v. Fowler*, 1 Stark. 463.

⁷ The consideration, *e. g.* value received, for account, &c., as also the kind of consideration must be expressed in bills, indorsements and notes by the Code Napoleon (§§ 110, 137, 188), which is in force in *France, Belgium, Geneva, Greece, Hayti, San Domingo and Turkey*. For the origin and construction of these provisions in France, see *Bedarride Droit Commercial* Vol. 1 pp. 112, 458. The law is similar in *Bolivia* (Code Com. 1834 Art. 362); and

§ 180. **Effect of "Value Received"—Pleading and Evidence.**—The words "value received" are not in general essential to the negotiability of a bill of exchange or prom-

in *Italy* (Code Com. 1865 Art. 196, and in indorsements, Art. 223). So, too, in *Brazil* (Code Com. 1850 Arts. 354, 359), where a statement is also required of the person from whom it was received in case of indorsement, and without such statement of consideration the indorsement is merely a power to collect (*Ib.* 361)—although a blank autograph indorsement properly dated will imply both consideration and transferability (*Ib.* 362). In *Chili* (Code Com. 1865 Arts. 633, 658, 660,) both bill or note and indorsement must contain like statement of consideration, and without it the indorsement amounts not to a transfer but only to a power to collect. So, drafts and notes must contain such statement (*Ib.* 771). In *Holland* the value, and whether received or to account, must be expressed in bills (Exch. Law 1838 Art. 100) and notes (*Ib.* 208), but not in drafts (*Ib.* 210). In *Hungary* it is unnecessary but may be added without harm (Law of 1860 § 16). In *Mexico* the consideration, its kind and manner of payment, must be expressed in bills, drafts, notes, and indorsements (Code Com. 1854 §§ 223, 360, 447). So, too, in *Nicaragua* (Code Com. 1869 Arts. 241, 261) as to bills and their indorsement—the indorsement without such expression amounting only to a power to collect. The expression "for value agreed" or "to account" makes the acceptor liable to the drawer. In *Spain* (Code Com. 1829 Art. 426) the consideration, its kind and from whom received, and whether received or on account, must be expressed both in bills, indorsements of bills (*Ib.* 467), and drafts and notes (*Ib.* 563)—and if for value agreed or to account, the payee is *prima facie* liable therefor to the drawer (*Ib.* 428). So in *Colombia* (Code Com. 1853 Arts. 384, 386, 424, 517), *Costa Rica* (Code Com. 1853 Arts. 373, 375, 414, 510), *Ecuador* and *Salvador* (Code Com. 1855 Arts. 381, 421, 510). In *Zurich* (Exch. L. 1805 § 1) the consideration, whether received or to be accounted for, and in what manner and from whom received, must be expressed in bills of exchange. In *Uruguay* (Code Com. 1865 Art. 822) a statement as to consideration and from whom it proceeds is only required in indorsements, but a blank indorsement implies consideration (*Ib.* 823). The expressions "value as agreed," "value to account," are *prima facie* evidence of the acceptor's liability to the drawer (*Ib.* 793). In *Venezuela* bills, drafts, notes and indorsements must express the consideration and how it is received or to be accounted for (Code Com. 1862 Arts. 1, 34 and Law II. Art. 1), and in the absence of such expression an indorsement has only the force of a power to collect (*Ib.* 36). The consideration must be expressed in bills of exchange and indorsements, as well as from whom it proceeds, and in what form and whether received or to account, in *Honduras*, *Guatemala* and *Paraguay* (Ordinances of the City of Bilbao A. D. 1774 ch. 13 §§ 2, 3). The statement of "value received" is not necessary to the regularity of a bill of exchange in the *Argentine Republic* (Code Com. 1862 Art. 779, its absence having no effect on third persons and its expression serving only to show *prima facie* the relation between the drawer and acceptor). In *Peru* the consideration, its kind and how received or to be accounted for must be expressed in bills (Code Com. 1853 Art. 381), indorsements (*Ib.* 425), drafts and notes (*Ib.* 522)—and if for value agreed or to account, the acceptor is *prima facie* liable therefor to the drawer (*Ib.* 384). In *Portugal* the consideration, and whether it has been received or is to be accounted for, must be expressed by the words "value received," "value to account," in bills of exchange (Code Com. 1833 Art. 321), promissory notes (*Ib.* 424, 426) and indorsements (*Ib.* 355), and in indorsements it must also appear if the consideration proceeds from a third person (*Ib.* 355), but value is implied in a blank indorsement, if signed and dated (*Ib.* 356). Except as above executed, an indorsement is merely a power to collect (*Ib.* 357) and a promissory note merely evidence of debt (*Ib.* 426). In *Russia* the

issory note.¹ But they are required by statute in Missouri.² And they are also necessary in Missouri to the recovery of the statutory damages on a bill of exchange.³ As the want of such words does not in general affect the negotiability of an instrument, so a full statement of the consideration of a negotiable instrument does not affect its negotiability.⁴ And it is now well settled that an action of "debt" lies upon an instrument without such words.⁵

In declaring upon a bill of exchange or note no averment is necessary that it contains the words "value received" or their equivalent.⁶ And in declaring upon an assignment of a note, the averment that it contains such words is immaterial and need not be proved.⁷ But if a note has been assigned without recourse, the declaration should aver that the assign-

consideration and kind of consideration must be stated in bills and notes (Exch. L. 1832 Art. 541), and in indorsements (*Ib.* 559), and the person from whom it proceeds may be added in the latter case. In *Denmark* "value received" is only *prima facie* evidence of consideration (Exch. Law 1825 § 5). It must also appear in the indorsement and whether received or to account, and an acknowledgment of consideration without specifying its nature implies cash (*Ib.* § 12). In *Lower Canada* the words "value received" are but *prima facie* evidence of that fact, and if omitted the instrument is not thereby invalidated (Civil Code 1867 § 2285).

¹ *White v. Ledwich*, 4 Dougl. 247 (1785); *Creswell v. Crisp*, 2 Crompt. M. & R. 634; *Bristol v. Warner*, 19 Conn. 7 (1848); *Coursin v. Ledlie*, 31 Penna. St. 506 (1858); *Hubble v. Fogartie*, 3 Rich. L. 413 (1832); *Kendall v. Galvin*, 15 Me. 131 (1838); *Noyes v. Gilman*, 65 *Ib.* 589 (1876).

² *Lowenstein v. Knopf*, 2 Mo. App. 159 (1876); *International Bank v. German Bank*, 3 *Ib.* 362 (1877); *Bailey v. Smock*, 61 Mo. 213 (1875); *R. C. Mo.* 1835 p. 104 § 2; *Austin v. Blue*, 6 Mo. 265 (1840); *Beatty v. Anderson*, 5 *Ib.* 447 (1838).

³ Rev. Code 1835 p. 298 § 7; *Riggs v. City of St. Louis*, 7 Mo. 438 (1842).

⁴ *Doherty v. Perry*, 38 Ind. 15 (1871); *Newton Wagon Co. v. Diers*, 10 Neb. 284 (1880).

⁵ Byles 88; *Chitty* 185; *Story on Prom. Notes* § 52; *Watson v. Kightly*, 11 Ad. & El. 702; S. C., 3 Per. & D. 408; *Hatch v. Traves*, *Ib.* (1840). Although this was formerly questioned, *Bishop v. Young*, 2 Bos. & P. 78; *Priddy v. Henbry*, 3 D. & R. 165; S. C., 1 B. & C. 674.

⁶ Byles 88; *Chitty* 185, 637; 1 *Daniel* 118; 1 *Edwards* § 202; *Story on Bills* § 63; *Coombs v. Ingram*, 4 D. & R. 211; *Bond v. Stockdale*, 7 *Ib.* 140; *Underhill v. Phillips*, 10 Hun 591 (1877); *Rector v. Fornier*, 1 Mo. 204 (1822); *Richmond v. Patterson*, 3 Ohio 368 (1828). But see, *contra*, *Rossiter v. Marsh*, 4 Conn. 196 (1822). And where the words "for value received" in the declaration "were used and intended for a description of the note declared on, and not as an averment inserted by the pleader," proof of a note without such words has been held to constitute a variance, *Saxton v. Johnson*, 10 Johns. 418 (1813).

⁷ *Wilson v. Codman*, 3 Cranch 193 (1805).

ment was for a valuable consideration.¹ As averment of these words is immaterial in a declaration, so a plea averring their absence is immaterial and will not support a conviction for perjury.² It follows, from what has been already said, that an averment in a declaration that the note was “for value received” is sustained by proof of a note not containing those words but reciting the particular consideration.³

Notwithstanding the words “value received,” a want of consideration may be proved between the original parties.⁴ And it has even been held that where a note purported to be “for commission due for business transacted for” the maker, the maker might show at suit of the payee that the real consideration was services to be thereafter performed, which never had been performed.⁵ So a maker may set up usury notwithstanding the words “value received.”⁶ As,

¹Welch v. Lindo, 7 Cranch 159 (1812).

²People v. McDermott, 8 Cal. 288 (1857).

³Byles 88; Coombs v. Ingram, 4 D. & R. 211; Bond v. Stockdale, 7 Ib. 140; Bingham v. Calvert, 13 Ark. 399 (1853). And this is true also of a declaration on a bond, James v. Scott, 7 Porter 30 (1838). But where a special and particular consideration is averred in the declaration, it should be proved, *infra*.

⁴Byles 88; Chitty 80; Chalmer's Dig. 15; 1 Edwards § 202; 1 Parsons 194; Story on Prom. Notes § 51; Whitaker v. Edmunds, 1 Ad. & El. 638; Abbott v. Hendrick, 1 Man. & G. 796; S. C., 2 Scott N. R. 183; Halliday v. Atkinson, 5 B. & C. 503; Hill v. Buckminster, 5 Pick. 391 (1827); Parish v. Stone, 14 Ib. 198 (1833); Thacher v. Dinsmore, 5 Mass. 299 (1809); Schoonmaker v. Roosa, 17 Johns. 301 (1820); Litchfield v. Falconer, 2 Ala. 280 (1841); Snyder v. Jones, 38 Md. 542 (1873); Raymond v. Sellick, 10 Conn. 479 (1835); Sawyer v. Vaughan, 25 Me. 337 (1845); Stevens v. McIntyre, 14 Ib. 14 (1836); Russell v. Hall, 10 Mart. 288 (La. 1830). See, too, Hill v. Wilson, 42 L. J. Ch. 817 (1873). But see, *contra*, Bowers v. Hurd, 10 Mass. 427 (1813), where it was held that the maker's representative was estopped from denying the admissions as to consideration. This case must now be considered as overruled. In Rideout v. Bristow, 1 Crompt. & J. 231 (1830), 1 Tyrw. 84, however, an administratrix having been given a note “for value received from my late husband” was held to be estopped from showing that the note was given only for indemnity against another contract.

⁵Abbott v. Hendricks, 1 Man. & Gr. 791 (1840); S. C., 2 Scott N. R. 183. In this case it is said by Tindall, C. J.: “The distinction seems to be this: You may show either that there was no consideration for the contract or that it has failed; but you cannot set up a different contract, for that is contrary to the general principles of the law. As a defendant may prove where ‘value received’ is expressed in a note, that there was no consideration, so where a special consideration is stated, I think he is at liberty to show that it has failed.” So Maule, J.: “The cases show that although a consideration is stated in the note, you may prove that it was given for a different consideration or without any consideration at all.”

⁶Clark v. Sisson, 22 N. Y. 312 (1860).

however, all commercial paper imports a consideration, it follows that in all cases where want of consideration is made a defense the burden of proof is on the defendant.¹

Defenses as to the consideration of a bill or note, and its sufficiency, legality or failure, as well as the admissibility of such defenses and the presumptions made, and evidence required by law in such cases, are more particularly considered in a later chapter of this work.

¹Chitty 80; Story on Prom. Notes § 181; *Kinsman v. Birdsall*, 2 E. D. Smith 395 (1854); *Greer v. George*, 7 Ark. 131 (1847); *Ware v. Kelly*, 22 Ark. 441 (1860); *Jerome v. Whitney*, 7 Johns. 321 (1811). But if the plaintiff in his declaration avers a special and particular consideration, he must prove it, *Jerome v. Whitney*, *supra*; *Knill v. Williams*, 10 East 431.

III. BLANKS.

- 181. Blanks—Power to Fill.
- 182. Omissions not Blanks.
- 183. When Blank Must be Filled.
- 184. Blanks in Sealed Bonds and Notes.
- 185. *Particular Blanks*—Signature—Party's Name.
- 186. Date—Time and Place of Payment—Rate of Interest.
- 187. Amount—Authority Exceeded.
- 188. Indorsements.
- 189. American and Foreign Statutes.

§ 181. **Blanks—Power to Fill.**—The leaving of blanks in a contract and the delivery of the instrument with such blanks create an agency in the receiver and his assigns to fill the blanks in the way agreed upon or contemplated by the maker. And any departure from this agreement will defeat the right of such original holder to recover upon the instrument. The maker has, however, held out the agent to others as clothed with general powers and cannot set up against a *bona fide* holder for value that his authority has been overstepped by the agent.

The authority to fill a blank in such case is derived wholly, as will be seen, from the implied agency created by the maker's act in putting the paper into circulation. Without voluntary delivery, as for instance where the instrument has been stolen before its completion, even a *bona fide* holder has no authority to bind the maker by filling the blanks.¹

¹*Baxendale v. Bennett*, L. R. 3 Q. B. D. 525 (1878); *Ledwick v. McKim*, 53 N. Y. 307 (1873). In the latter case this distinction is made very clear in the language of Folger, J. (p. 314). "The implied authority is found in the fact of delivery for use. For as it is not to be presumed that the delivery for use was meant to be a nugatory and unavailing act, and as it is apparent that it would be, if the instrument may not be perfected before put to use, the law implies an intention, and hence an authority, that he to whom it is thus delivered may supply all needs for making it a perfect and binding negotiable instrument. But this authority is not implied from the fact alone that the paper is in hands other than those of him who is to be bound, but from that fact joined with this other fact, that it has been by him intrusted to those hands for the purpose and with the intent that it shall go into use and circulation. * * * No authority has been cited which decides that the maker of an instrument, negotiable but for some lack susceptible of being supplied, so that it is yet imperfect, who has not by his own act, or by the act of another authorized or confided in by him, put it in circulation, confers a power upon even a *bona fide* holder to supply that lack. He must have been himself instrumental in its leaving his possession and control

The delivery of a bill of exchange, note or check, with a blank left by the maker or drawer in any part of it, implies an authority to the holder to fill it as he may please, unless there are restrictions apparent on the face of the instrument.¹ And the writing of an acceptance on a piece of blank stamped paper has been held sufficient evidence of authority to draw a bill for the amount covered by the stamp.² In like manner a note may be written over a blank signature given for that purpose.³ So, too, an indorsement on blank paper authorizes the drawing of a promissory note to the order of such indorser.⁴ And the same authority is implied from a blank indorsement on a printed note blank.⁵ In such cases it is

and passing into that of another, and have been so with the purpose of its becoming effectual for circulation, or with some trust in the person to whom committed, before he can be held liable. He must in some way and for some purpose have created an agency in some one to act with or to hold the paper, and to find an authority in a subsequent holder to make perfect the imperfect paper, this agency must first be established."

¹ Byles 89; Chitty 38; 1 Daniel 145; 1 Edwards §§ 88, 91; 1 Parsons 33, 115; Story on Bills § 53; Story on Prom. Notes § 10; Collis v. Emmett, 1 H. Bl. 313 (1790); Ives v. Farmers' Bank, 2 Allen 236 (1861); Androscoggin Bank v. Kimball, 10 Cush. 373 (1852); Aiken v. Cathcart, 3 Rich. 133; Bank of Pittsburg v. Neal, 22 How. 96 (1859); Boyd v. Brotherson, 10 Wend. 93 (1833); Mitchell v. Culver, 7 Cow. 336 (1827); Van Duzer v. Howe, 21 N. Y. 351 (1860); Redlich v. Doll, 54 Ib. 234 (1873); Witte v. Williams, 8 So. Car. 290 (1876); Young v. Ward, 21 Ill. 223 (1859); Griggs v. Howe, 31 Barb. 100 (1860); Abbott v. Rose, 62 Me. 194 (1873); Bank of Commonwealth v. Curry, 2 Dana 142 (1834); Bank of Kentucky v. Garey, 6 B. Mon. 626 (1846); Lisle v. Rogers, 18 Ib. 537 (1857); Armstrong v. Harshman, 61 Ind. 52 (1878); Goodman v. Simonds, 20 How. 343 (1857); Green v. Kennedy, 6 Mo. App. 577 (1878); McArthur v. McLeod, 6 Jones 475 (1859).

² Montague v. Perkins, 22 L. J. C. P. 187 (1853); even though the bill was not drawn until twelve years afterward, *Ib.* And the authority to fill up such a blank bill extends to the administrator of the original holder, Seard v. Jackson, 34 L. T. (N. S.) 65 (1876). But the holder of such blank acceptance cannot fill up the blank left for the drawer's signature after he has notice of the absence of authority from the acceptor to do so, Hogarth v. Latham, 26 W. R. 388 (1878); S. C., L. R. 3 Q. B. D. 643.

³ Patton v. Shanklin, 14 B. Mon. 15 (1853); but so far as concerns the interest clause in such a note, no authority will be implied for more than legal interest, and the excess cannot be recovered, *Ib.* But such paper cannot be sealed and filled up as a bond, Manning v. Norwood, 1 Ala. 429 (1840); Smith v. Carder, 33 Ark. 709 (1878).

⁴ 1 Edwards § 88; 1 Parsons 114; Story on Prom. Notes §§ 10, 37; Violet v. Patton, 5 Cranch 151 (1809); Moody v. Threlkeld, 13 Ga. 55 (1853); Young v. Ward, 21 Ill. 223 (1859); Ferguson v. Childress, 9 Humph. 382 (1848). Although the signer may have intended to be bound only as a surety, Moody v. Threlkeld, *supra*.

⁵ Russell v. Langstaffe, 2 Dougl. 514 (1809), Lord Mansfield in this case declaring such indorsement to be "a letter of credit for an indefinite sum."

immaterial whether a negotiable or non-negotiable note be written on the blank paper.¹

But if a blank bill form is signed by any one and afterwards filled out as a note, the maker will not be liable on it at suit of the person who has filled it up.² Where a paper is negligently signed by one who mistakes it for a contract of different character, he will be liable on a note afterwards filled out above his signature.³ But where a name was written on a blank piece of paper for a different purpose, *e. g.* to show its spelling, and the paper was carried off against the will of the signer and filled up with a promissory note, it will not bind the signer for want of a valid delivery.⁴ There must in every such case be circumstances from which an intention to make a bill or note can be implied.

§ 182. **Omissions not Blanks.**—This power, moreover, only extends to cases where a blank has been left in the instrument, and does not include any authority to make additions.⁵

¹ Daniel 149; *Orrick v. Colston*, 7 Gratt. 189 (1850); *Douglass v. Scott*, 8 Leigh 43; *Spitler v. James*, 32 Ill. 202 (1869).

² *Luellen v. Hare*, 32 Ind. 211 (1869). And see, as to suit by a *bona fide* holder, *Mahaiwe Bank v. Douglass*, 31 Conn. 170 (1862). See, too, for implied ratification of such act, *Ward v. Williams*, 26 Ill. 447 (1861). And it has been held, in Alabama, that one signing a blank paper for the purpose of having a bond written over his signature, was not bound, even to a *bona fide* holder, for a promissory note fraudulently written instead of the bond, *Nance v. Lary*, 5 Ala. 370 (1843).

³ *Ross v. Doland*, 29 Ohio St. 473 (1876). And where a person signed eight blank bills of exchange intended for first and second parts of four separate bills, the second parts being marked "second of exchange, first unpaid," he is liable to a *bona fide* holder if all are filled up and negotiated as distinct bills for different amounts, *Bank of Pittsburgh v. Neal*, 22 How. 96 (1859). As to negligence in leaving blank space by which amount may be increased, see § 187, *infra*.

⁴ *Parsons* 114; *Cline v. Guthrie*, 42 Ind. 227 (1873). So, too, where the name was written to identify a signature, the note fraudulently written over it, was held to be a mere forgery, *Caulkins v. Whisler*, 29 Iowa 495 (1870). So, too, where the signature is procured by fraudulent misrepresentation of the character of the paper signed, the signer not being guilty of negligence, *Foster v. MacKinnon*, L. R. 4 C. P. 704 (1869); *Whitney v. Snyder*, 2 Lans. 477 (1870); *Walker v. Ebert*, 29 Wis. 194 (1871).

⁵ *Daniel* 147; *McGrath v. Clark*, 56 N. Y. 34 (1874). So, *Coburn v. Webb*, 56 Ind. 100, where "after maturity" was added to the interest clause without authority, *Franklin Life Ins. Co. v. Courtney*, 60 *Ib.* 134 (1877). So the addition of "bearing ten per cent. interest after maturity," *Ivory v. Michael*, 33 Mo. 398; or simply of the words "with interest," *Waterman v. Vose*, 43 Me. 504 (1857); *Kountz v. Hart*, 17 Ind. 329 (1861). See, too, *Mahaiwe Bank v. Douglass*, 31 Conn. 170 (1862); *Morehead v. Parkersburg Nat.*

Thus, a place of payment cannot be inserted, where none has been named nor any blank left for it.¹ And the words "with interest at," in a printed form, constitute no blank and authorize no insertion of a rate of interest.² In like manner a blank implies no authority to make an erasure;³ or to fill in an unusual provision, such as a waiver of appraisalment.⁴ But, as we have seen, the instrument written in the blank may be made either negotiable or non-negotiable. And if made negotiable in disregard of a verbal agreement to the contrary, it will still bind the maker in the hands of a *bona fide* holder for value.⁵ And where, as in

Bank, 5 W. Va. 74 (1871). So, an addition of the words "or his order" in a space inadvertently left after the payee's name is a material alteration, *Bruce v. Westcott*, 3 Barb. 374 (1848). So, in *Ives v. Farmers' Bank*, 2 Allen 236 (1861), the following note was held to express a time of payment and the insertion of the words in brackets were held to be an addition which avoided the note: "Brooklyn, Sept. 20, 1858. [Three months] after date I prom. to pay Dec. 23," &c. But where an addition similar to that in *Ivory v. Mitchell*, *supra*, was subsequently erased in a public manner, it was held not to avoid the note, *Shepard v. Whetstone*, 51 Iowa 457 (1879).

¹*Morehead v. Parkersburg Nat. Bank*, 5 W. Va. 74. And such addition is *prima facie* an alteration, *Simpson v. Stackhouse*, 9 Penna. St. 186 (1848); and is a material alteration, *McCoy v. Lockwood*, 71 Ind. 319 (1880). But after the printed words "payable at," a place of payment may be inserted, *Marshall v. Drescher*, 68 Ind. 359.

²*Holmes v. Trumper*, 22 Mich. 427 (1871). So, a clause reading "with — per cent. attorney's commissions if collected," does not authorize any insertion without a special agreement therefor, and leaves the note non-negotiable, *Johnston v. Speer*, 92 Penna. St. 227 (1879).

³1 Daniel 147; *Mahaiwe Bank v. Douglass*, 31 Conn. 170 (1862). And where the drawer fills up the amount in several parts of a bill marked "first," "second," &c., and delivers them with blanks for date, drawee and payee, an alteration into distinct bills by erasure of the words "first," "second," and insertion of the word "only" made by the acceptor avoids them so that an accommodation indorser cannot recover against the drawer without proving his authority for the alteration, *Fontaine v. Gunter*, 31 Ala. 258 (1857). A *bona fide* holder may, however, strike out indorsements, *Moore v. Maple*, 25 Ill. 341 (1861). But he cannot strike out an indorser's name and insert it in a blank acceptance without discharging a co-indorser who had signed the instrument before the alteration, *Mahone v. Central Bank*, 17 Ga. 111 (1855).

⁴*Holland v. Hatch*, 11 Ind. 495 (1858). In Ohio, however, the same addition was held to be an immaterial alteration and rejected as surplusage leaving the bill valid, *Holland v. Hatch*, 15 Ohio St. 464 (1864). See, too, *McCoy v. Lockwood*, 71 Ind. 319 (1880). But filling a blank note up as a *joint and several* obligation is no ground of defense, *Bank of Limestone v. Penick*, 5 T. B. Mon. 25 (1821). One who signs a blank paper, however, as surety does not thereby authorize the principal to write a note above it and add his own signature, and add seals to both signatures, and is not bound by such instrument, *Smith v. Carder*, 33 Ark. 709 (1878).

⁵*Orrick v. Colston*, 7 Gratt. 189 (1850); *Douglass v. Scott*, 8 Leigh 43; *Spitler v. James*, 32 Ind. 202 (1869). So, *Gillaspie v. Kelley*, 41 Ind. 158

Ohio, a seal is immaterial and the blank is properly filled, but an unauthorized seal is added, this exceeding of authority will not vitiate the instrument.¹ It may be added that the presumption of authority to fill a blank extends to the case of a partnership note made by one member of a firm.²

§ 183. **When Blank Must be Filled.**—It is laid down as a general rule that a blank must be filled within a reasonable time; what is reasonable being a question of fact for the jury to determine.³ The blank may be filled after the instrument has been transferred by indorsement;⁴ or even after its maturity;⁵ or after the drawer has become insolvent;⁶ or at the time of the trial.⁷ In fact, title vests by a blank indorsement, even though it be not filled up before judgment rendered.⁸ It is said, however, that a bill of exchange with blank for payee's name is no bill until filled up, and it must therefore be filled before recovery can be had on

(1872), filling in the name of bank left blank for place of payment and thereby making the note negotiable. But adding words, where no blank is left for them, which make a note payable at a certain bank and thereby render it negotiable, constitutes a material alteration, *Morehead v. Parkersburg Nat. Bank*, 5 W. Va. 74 (1871).

¹ *Fullerton v. Sturges*, 4 Ohio St. 529 (1855). But in Alabama the unauthorized addition of a seal to the signature on a blank piece of paper, and the filling up and delivery of it as a bond, does not render the maker liable, *Manning v. Norwood*, 1 Ala. 429 (1840). So, too, in Arkansas, *Smith v. Carder*, 33 Ark. 709 (1878).

² *Chemung Canal Bank v. Bradner*, 44 N. Y. 680.

³ *Temple v. Pullen*, 8 Exch. 389 (1853); *Chalmer's Dig.* 24. But in *Montague v. Perkins*, 22 L. J. C. P. 187 (1853), filling the blank after twelve years was held to bind the acceptor in blank.

⁴ *Armstrong v. Harshman*, 61 Ind. 52 (1878).

⁵ *Farmers' and Merchants' Bank v. Horsey*, 2 Houst. 385 (1861).

⁶ *Fetters v. Muncie Nat. Bank*, 34 Ind. 251 (1870). But in *Temple v. Pullen*, 8 Exch. 389 (1853), where a blank signature on a note stamp was given before, but not filled up until after, bankruptcy, it was held to constitute a cause of action arising after the bankruptcy and not discharged thereby. In *Ex parte Bartlett*, 3 DeG. & J. 378 (1858), however, a blank acceptance was admitted to proof against a bankrupt, although the bill had been drawn after the bankruptcy. And see, too, *Abrahams v. Skinner*, 12 Ad. & El. 763 (1840).

⁷ *Croskey v. Skinner*, 44 Ill. 321 (1867). Or if the plaintiff shows himself at the trial entitled to fill such blank, the actual filling up may be dispensed with, *Weston v. Myers*, 33 Ill. 424 (1864). So, a blank indorsement may be filled at the trial, *Mitchell v. Mitchell*, 11 Gill & J. 388 (1841); *Whiteford v. Burekmyer*, 1 Gill 127 (1843).

⁸ *Rees v. Conococheague Bank*, 5 Rand. 326 (1827).

the instrument.¹ But when once filled up, it relates back to the time of its delivery. Thus, a bill delivered in Bavaria with blanks which were afterwards filled up in London is a foreign and not an inland bill.²

Authority to fill a blank left by the maker ends in general with the maker's life.³ The rule is, however, different in the case of a blank acceptance coupled with an interest.⁴ And a blank date may be filled after the death of one of the makers of a partnership note.⁵ So, too, the amount of a partnership note left blank may be filled after the dissolution of the firm, the payee not having had notice of that fact.⁶

¹*Greenhow v. Boyle*, 7 Blackf. 56 (1843). See, however, *Weston v. Myers*, 33 Ill. 424 (1864); *Wood v. Wellington*, 30 N. Y. 218 (1864).

²*Barker v. Sterne*, 9 Exch. 684 (1854); *Snaith v. Mingay*, 1 M. & S. 87. But see *Temple v. Pullen*, *supra*; *Goldsmid v. Hampton*, 5 C. B. (N. S.) 94 (1858); also, *Abrahams v. Skinner*, 12 Ad. & El. 763 (1840), where the blank bill was stamped in a manner sufficient at the time the acceptance was signed and insufficient at the time it was filled up and this was held to be bad, Lord Denman, C. J., saying of *Snaith v. Mingay*: "That case has not, that we are aware of, been questioned, nor do we intend to dispute its authority: at the same time we cannot but say that the doctrine of relation, which is in no case to be favored, appears to us to be fraught with peculiar difficulties when applied to bills of exchange. The difficulty in the present case may be said to be owing to an unusual circumstance, the change of stamp: but under the most ordinary circumstances it is calculated to introduce very embarrassing questions, highly unfavorable to the free and easy negotiation of these instruments, if any doctrine of law prevails which makes the requisite amount of stamp or the period of maturity uncertain. Leaving, however, that decision untouched, it appears to us that there is a substantial distinction between a blank drawing and a blank acceptance, as regards the doctrine of relation. The party who, with the intention of drawing a bill, writes his name at the bottom of the paper, does a part of the act of drawing; and when another person by his authority at a subsequent period fills in above the sum and date and the time of currency, he does but complete the act which the party had begun: when completed it is all one act; and there is nothing unreasonable, in the absence of evidence of any contrary intention, in holding that the act shall date from the time when the most important part of the bill was written. But the drawing and acceptance of a bill are two distinct acts. The latter is not essential to the completeness of the instrument. It may never be done at all, and when done there is no necessity for their being concurrent in point of time, no reason for considering them so in legal effect and of course none for holding that acceptance should draw back to itself by relation the time of drawing the bill, where in fact it has preceded it."

³*Michigan Ins. Co. v. Leavenworth*, 30 Vt. 11 (1856); *Canal, &c., R. R. Co. v. Armstrong*, 27 La. An. 433 (1875). At least where the blank bill or acceptance was given for accommodation only, *Hatch v. Searles*, 2 Sm. & Giff. 147 (1854).

⁴*Hatch v. Searles*, 2 Sm. & Giff. 147 (1854).

⁵*Usher v. Dauncey*, 4 Campb. 97 (1814).

⁶*Chemung Canal Bank v. Bradner*, 44 N. Y. 680 (1871).

§ 184. **Blanks in Sealed Bonds and Notes.**—It has been generally held, both in this country and in England, that a blank left in a sealed instrument, which at common law was not negotiable, could not be filled after delivery under any such authority as we have seen to be implied by law in the case of commercial paper.¹ And this is still the rule wherever the old legal distinctions between sealed and unsealed instruments are maintained. The case of *Texira v. Evans*, in which the contrary was held, has been overruled in England and very generally disapproved in this country.²

It has even been held that a blank left in a deed could not be filled by the grantor's agent before its delivery.³ And,

¹ Daniel 148; *Hibblewhite v. McMorine*, 6 M. & W. 200 (1840); *Enthoven v. Hoyle*, 13 C. B. 373; *Squire v. Wilton*, 1 H. L. C. 333; *Ledwich v. McKim*, 53 N. Y. 307 (1873); *Spencer v. Buchanan*, Wright 583 (Ohio 1834); *Rhea v. Gibson*, 10 Gratt. 215; *Preston v. Hull*, 23 *Ib.* 602 (1873); *Clark v. City of Janesville*, 1 Biss. 98 (1856); *Penn v. Hamlett*, 27 Gratt. 337 (1876); *Van Amringe v. Morton*, 4 Whart. 382 (1837). And a blank cannot be filled in a deed or mortgage of land, *Chauncey v. Arnold*, 24 N. Y. 330 (1862); *Ayres v. Probasco*, 14 Kans. 175 (1875); *Viser v. Rice*, 33 Tex. 139 (1870). But the insertion of a date, in itself immaterial, will not avoid a deed, *Whiting v. Daniel*, 1 H. & Munf. 391 (1807). And it was held, in *Van Etta v. Evenson*, 28 Wis. 33 (1871), that a mortgagee's name might be inserted in a sealed mortgage left blank for that purpose.

² *Texira v. Evans*, cited in *Master v. Miller*, 1 Anstr. 228; since overruled in *Hibblewhite v. McMorine*, 6 M. & W. 200 (1840); *Davidson v. Cooper*, 11 *Ib.* 770 (1843). But it has been held that a blank in a bond upon a claim of property under execution may be filled after delivery, if so intended, *State v. Dean*, 40 Mo. 464 (1867). And a surety may be held on a bond filled in after delivery with his acquiescence, *Bartlett v. Board of Education*, 59 Ill. 364 (1871); and so, in general, without acquiescence on his part, *State v. Pipper*, 31 Ind. 76 (1869); *Smith v. Crooker*, 5 Mass. 538 (1809). And blanks left in a sealed warrant of attorney filled out according to the maker's intention have been held binding upon him, *Vliet v. Camp*, 13 Wis. 193 (1860). In the case of the *United States v. Nelson*, 2 Brock. 64 (1822), it was held that sureties signing an official bond or the printed form of one with names and penalty in blank could not be understood to have authorized the filling of the blanks and were consequently not bound thereby; *Marshall, C. J.*, saying in this case: "I say with much doubt and with a strong belief that this judgment will be reversed, that the law on this verdict is, in my judgment, with the defendants." This case was not followed in Wisconsin by *Van Etta v. Evenson*, 28 Wis. 33 (1871), permitting the name of the mortgagee to be inserted in a mortgage, in which a blank had been left for it. For many other cases on both sides of this question, see *Simms v. Hervey*, 19 Iowa 291 (1865); *City of Elizabeth v. Force*, 2 Stew. Eq. 592 note.

³ *Davenport v. Sleight*, 2 Dev. & B. 381 (1837); *McKee v. Hicks*, 2 Dev. 379; *Kime v. Brooks*, 9 Ired. 218 (1848). But see, *contra*, *Duncan v. Hodges*, 4 McCord 239 (1827); and, in the case of an appeal bond, *Ex parte Kerwin*, 8 Cow. 118 (1828); also, *obiter*, *McCown v. Wheeler*, 20 Tex. 372 (1857); *Ex parte Decker*, 6 Cow. 60 (1826). And in *Adsetts v. Hives*, 33 Beav. 52 (1863), names and date in a mortgage left blank were filled by the solicitor before delivery, and it was held that these parts were merely formal and filling them in was no material alteration.

a fortiori, after delivery such blank cannot be filled up by the holder. This is the case as regards a bail-bond condition left blank.¹ So, as to amount left blank in a non-negotiable sealed note.² It has been held, however, that a co-obligor may sign a sealed bond left blank for that purpose without discharge of the other obligors, who had consented thereto.³

An exception to the ordinary rules in regard to sealed instruments is made in favor of "coupon bonds" and other corporation bonds, negotiable in form and plainly intended for transfer by delivery or indorsement. These bonds, as has been remarked in an earlier part of this work, have many, if not all, of the characteristics of unsealed commercial paper. In such instruments a blank may be filled in the same manner and under the same restrictions as in a bill of exchange or promissory note.⁴

§ 185. **Blank—Signature—Name of Party.**—The rule of implied authority in the holder to fill blanks in a bill of exchange or note applies with equal force to almost all parts

¹ *Powell v. Duff*, 3 Campb. 182 (1812). But in Pennsylvania it has been held that a recognizance signed in blank by a surety may afterward have the amount, &c., filled up by the officer, *Coster's Appeal*, 13 Penna. St. 292 (1850).

² *Barden v. Southerland*, 70 N. C. 528 (1874); *Mosby v. State of Arkansas*, 4 Sneed 324 (1857).

³ *Speake v. United States*, 9 Cranch 28 (1815).

⁴ *Daniel* 154; *White v. V. & M. R. R.*, 21 How. 575 (1858); *Chapin v. V. & M. R. R.*, 8 Gray 575; *Gourdin v. Commander*, 6 Rich. 497 (1852); *Stahl v. Berger*, 10 Serg. & R. 170 (1823); *Brainerd v. N. Y. & H. R. R.*, 25 N. Y. 496; *Hubbard v. N. Y. & H. R. R.*, 36 Barb. 286; *Berwick v. Huntress*, 53 Me. 89 (1865); *Dutchess Co. Ins. v. Hachfield*, 1 Hun 675 (1874); *Boyd v. Kennedy*, 9 Vroom 146 (1875). In this case, *Depue, J.*, says: "The reason assigned in *Hibblewhite v. McMorine*, for overruling *Texira v. Evans*, and re-establishing the technical rule of the common law—that the authority of an agent to fill a blank in an instrument under seal, and thus make it the valid deed of his principal, must be conferred by deed—was that the contrary doctrine would make a deed transferable and negotiable like a bill of exchange or exchequer bill, which the law did not permit. This decision was prompted by considerations of a public policy, which, it was supposed, forbid that obligations under seal should be put on the same footing as ordinary commercial paper, in their negotiability. A different opinion of the requirements of public policy is entertained by the courts of this State and generally throughout the United States. * * * Such securities by common usage, sanctioned by the courts, have obtained the qualities and attributes of negotiable paper in respect to their transfer. Under such circumstances the reason on which *Hibblewhite v. McMorine* is based is not only inapplicable, but is furthermore inconsistent with the qualities with which such paper has become invested."

of the instrument. Even the *signature* of the drawer may be added after a blank acceptance;¹ or of a co-obligor to a note signed in blank.² And if a surety sign a renewal note, with the understanding that it is to be signed by the other sureties on the original note, and leave a blank for the signatures of such sureties, and different sureties afterwards sign in such blank, a *bona fide* holder may recover against all, even after altering the names in the note to correspond with the signatures.³ So, if the payee named in a note indorse and deliver it before it is signed, authority to insert the name of a maker by way of signature will be implied, although a different signature be obtained than the one intended by the indorser.⁴

It is a rule of commercial paper that the *names* of the parties or other sufficient designation of them must appear upon it. If, however, a bill of exchange fail to name the *drawee* or leave a blank for his name, the omission will be supplied by the acceptance.⁵ It has been held in England that a bill or note with the *payee's* name blank is incomplete and cannot sustain an indictment for forgery.⁶ The contrary doctrine has, however, been held in Indiana.⁷ If the name of the payee be left blank, the instrument is in general equivalent to one that is made payable to the bearer.⁸ In such case the

¹Moiese v. Knapp, 30 Ga. 942 (1860). In such case a *bona fide* holder may insert his own name as drawer, Harvey v. Cane, 24 W. R. 400; 34 L. T. (N. S.) 64 (1876). And it was held, as we have seen, that this might even be done twelve years after the blank acceptance was signed, Montague v. Perkins, 22 L. J. C. P. 187 (1853). But without a drawer's signature such instrument is not a bill of exchange, Stoessiger v. S. E. Railway Company, 3 El. & Bl. 549 (1854); and cannot be declared on as such, McCall v. Taylor, 19 C. B. (N. S.) 301 (1865).

²Bank of Commonwealth v. McChord, 4 Dana 191 (1836).

³Jones v. Shelbyville Ins. Co., 1 Mete. 58 (Ky. 1858).

⁴Whitmore v. Nickerson, 125 Mass. 496 (1878). In this case the note was made payable to A. and indorsed by him before it was signed, and afterwards delivered by him to B. for the signature of his firm, but signed and negotiated by B. in his individual name without A.'s knowledge or authority. A. was nevertheless holden by reason of his implied authority to B.

⁵Wheeler v. Webster, 1 E. D. Smith 1 (1850).

⁶Rex v. Randall, Russ. & Ry. C. C. 195 (1811).

⁷Harding v. The State, 54 Ind. 359 (1876).

⁸1 Daniel 151; Wood v. Wellington, 30 N. Y. 218 (1864); Cruchley v. Clarence, 2 M. & S. 91 (1813); Dunham v. Clogg, 30 Md. 284 (1866); Dinsmore

bill or note is not complete until the blank is filled up, but takes effect then from its date, as if there had been no blank.¹ Leaving such blank for the name of the payee gives to any *bona fide* holder for value an implied authority to fill the blank with his own name or with that of a third person.² And when so filled, the maker will be bound by it, notwithstanding an agreement between the original and immediate parties for the insertion of some other name as payee.³ Such a blank may be filled after the note has been transferred by an indorsement in blank.⁴ But where a note has been indorsed before its delivery by another person than the one to whom the promise was originally made, a subsequent holder, even though a *bona fide* holder for value, cannot fill with his

v. Duncan, 57 N. Y. 573 (1874). And it was held that as title passed by delivery, trover would not lie against a banker to whom such bill had been fraudulently delivered by the agent holding it for sale, *Wookey v. Pole*, 4 B. & Ald. 6.

¹ Daniel 152; 1 Edwards § 141; *Greenhow v. Boyle*, 7 Blackf. 56 (1843). But the actual filling in of payee's name in a due-bill was held unnecessary in *Weston v. Myers*, 33 Ill. 424 (1864); especially where the maker had also indorsed the note, *Usry v. Saulsbury*, 62 Ga. 179 (1879). So, too, in the indorsement of a note "Pay to —," &c., *Wood v. Wellington*, 30 N. Y. 218 (1864). So, in a note payable "to — or bearer," *Rich v. Starbuck*, 51 Ind. 90 (1875). As to such instruments taking effect by relation back, see § 183 *n*.

² Byles 85; 1 Daniel 151; 1 Edwards § 91; 1 Parsons 33; *Story on Bills* § 56; *Story on Prom. Notes* § 26; *Cruchley v. Clarence*, 2 M. & S. 90 (1813); *Cruchley v. Mann*, 5 Taunt. 529 (1814); *Rich v. Starbuck*, 51 Ind. 87 (1875); *Dinsmore v. Duncan*, 57 N. Y. 573 (1874); *Witte v. Williams*, 8 So. Car. 290 (1876); *Dunham v. Clogg*, 30 Md. 284 (1868); *Boyd v. McCann*, 10 Ib. 118 (1856); *Sittig v. Birkestack*, 38 Md. 158 (1873); *Hardy v. Norton*, 66 Barb. 527 (1873); *Weston v. Myers*, 33 Ill. 424 (1864); *Aiken v. Cathcart*, 3 Rich. 133; *Farmers' and Merchants' Bank v. Horsey*, 2 Houst. 385 (1861); *Townsend v. France*, *Ib.* 441 (1832); *Van Etta v. Evenson*, 28 Wis. 33 (1871); *Brummel v. Enders*, 18 Gratt. 873 (1868); *Stahl v. Berger*, 10 Serg. & R. 170 (1823); *Elliott v. Chesnut*, 30 Md. 562 (1869); *Greenhow v. Boyle*, 7 Blackf. 56 (1843); *Seay v. Bank of Tenn.*, 3 Sneed 558 (1856); *Bank of Kentucky v. Garey*, 6 B. Mon. 626 (1846); *Schooler v. Tilden*, 71 Mo. 580 (1880). But, with an alteration of the date, the instrument so filled and altered is not binding upon the maker in the absence of express authority from him, *Bland v. O'Hagan*, 64 N. C. 471 (1870). Nor can the payee's name left blank in a non-negotiable sealed note be filled in by the holder, *Barden v. Southerland*, 70 N. C. 528.

³ 1 Daniel 147; *Wilson v. Kinsey*, 49 Ind. 35 (1874); *Huntington v. Bank of Mobile*, 3 Ala. 186 (1841); *Witte v. Williams*, 8 So. Car. 290 (1876). A note payable to "A. B. or —," with a collateral mortgage may be explained by the latter so as to show "bearer" intended, enabling the assignee of the mortgage to sue on the note, *Elliott v. Deason*, 64 Ga. 63 (1879).

⁴ *Armstrong v. Harshman*, 61 Ind. 52 (1878).

own name a blank left for the payee's name and thereby make the first indorser a guarantor.¹

Although the holder is thus, in general, permitted to insert his own name as payee in the blank left for the payee's name, he does not become thereby one of the immediate and original parties and has not the liabilities of such a party. For instance, in a case where the note has been bought at a usurious rate of interest by a holder who fills the blank with his own name, the maker is not entitled to set up the defense of usury against him.² The omission of the payee's name occurs most frequently in blank indorsements. The holder under such blank indorsement or under an assignment in blank may write his own name or that of a third person in the blank.³ And he may afterward erase the name of the third person and insert his own.⁴

§ 186. **Blank Date—Time and Place of Payment—Rate of Interest.**—In like manner a blank left for the *date* may be filled by the holder;⁵ and this may be done even after the death of one of the makers of a partnership note, as we have

¹ Riddle v. Stevens, 32 Conn. 378 (1865).

² Brummel v. Enders, 18 Gratt. 873 (1868). But the burden of proof of such fact is upon the holder, as also the burden of proving himself a *bona fide* holder for value before maturity, Nelson v. Cowing, 6 Hill 336 (1844).

³ Brainard v. N. Y. & H. R. R., 25 N. Y. 496 (1862); Condon v. Pearce, 43 Md. 83 (1875); Canfield v. Melvaine, 32 Ib. 94 (1869); Whiteford v. Buckmyer, 1 Gill 127 (1843); Chesley v. Taylor, 3 Ib. 251 (1845); Mitchell v. Mitchell, 11 Gill & J. 388 (1841); Jones v. Berryhill, 25 Iowa 289 (1868); Moore v. Maple, 25 Ill. 341 (1861); Wilder v. De Wolf, 24 Ib. 190 (1860); Palmer v. Marshall, 60 Ib. 289 (1871); Beattie v. Browne, 64 Ib. 360 (1872); Moore v. Pendleton, 16 Ib. 481 (1861); Croskey v. Skinner, 44 Ib. 321 (1867); Lyon v. Ewing, 17 Wis. 63 (1863); Hubbard v. Williamson, 4 Ired. 266; Weirick v. Mahoning Bank, 16 Ohio St. 297 (1865); Pace v. Wilmending, 12 Bush 141 (1876). And see Kentucky statutes 1866 (G. S. c. 22 § 13). And when so filled it passes both the note and its collaterals, Farwell v. Meyer, 36 Ill. 510 (1864). And the indorsee may also add the date in filling in the indorsement as above, Maxwell v. Van Sant, 46 Ill. 58 (1867).

⁴ Jones v. Berryhill, 25 Iowa 289 (1868).

⁵ 1 Daniel 92, 148; 1 Edwards § 88; Story on Prom. Notes § 11 n. 1; 1 Parsons 115 (but see also 2 Ib. 552, 565); Michigan Bank v. Eldred, 9 Wall. 544 (1869); Page v. Morrell, 3 Keyes 117 (1866); 3 Abb. App. Dec. 433; Witte v. Williams, 8 So. Car. 290 (1876); Mitchell v. Culver, 7 Cow. 336 (1827); Androscoggin Bank v. Kimball, 10 Cush. 373 (1852); Fullerton v. Sturges, 4 Ohio St. 529 (1855); Shultz v. Payne, 7 La. An. 222 (1852); Michigan Ins. Co. v. Leavenworth, 30 Vt. 11 (1856). And in filling out an indorsement to the holder the date may be added, Maxwell v. Van Sant, 46 Ill. 58 (1867).

seen.¹ But it has been questioned whether this power of filling a blank date extends to ante-dating. And a note or bill ante-dated by any holder is void in the hands of subsequent holders with notice.² It is nevertheless valid in the hands of a *bona fide* holder for value without any such notice.³

A partial omission of a date, where no blank was intended, will be supplied in all cases of manifest mistake; *e. g.* in a case where the year was written "one thousand forty" by mistake for 1840.⁴ It may happen, however, where no date is expressed that none was intended. It is therefore sometimes said that a blank date is at most only *prima facie* evidence of an authority to fill it with any date.⁵

The *time of payment* as well as the date may be left blank and afterwards filled in by the holder.⁶ And if such blank is filled in a way different from that authorized by the maker, he will still be bound at suit of an innocent holder.⁷ In like manner a mere omission by mistake in the time of payment will be supplied, *e. g.* "in the (year) of our Lord," &c.;⁸

¹Usher *v.* Dauncey, 4 Campb. 97 (1814).

²1 Parsons 115; Emmons *v.* Meeker, 55 Ind. 321 (1876); Goodman *v.* Simonds, 19 Mo. 106 (1853). But a note may be ante-dated by agreement, the holder filling the blank date accordingly, Mitchell *v.* Culver, 7 Cow. 336 (1827).

³Page *v.* Morrell, 3 Keyes 117; 3 Abb. App. Dec. 433 (1866); Mitchell *v.* Culver, 7 Cow. 336 (1827); Mechanics' and Farmers' Bank *v.* Schuyler, *Id.* 337 *n.*

⁴Evans *v.* Steel, 2 Ala. 114 (1841).

⁵Stout *v.* Cloud, 5 Litt. 205 (1824). And even a *prima facie* authority has been denied in English *v.* Breneman, 5 Ark. 377 (1843); S. C., 9 *Id.* 122 (1848); but it is said in Page *v.* Morrell, 3 Keyes 117, that this case is "not supported by authority."

⁶McGrath *v.* Clark, 56 N. Y. 34 (1874); Witte *v.* Williams, 8 So. Car. 290 (1876); Fullerton *v.* Sturges, 4 Ohio St. 529 (1855); Michigan Ins. Co. *v.* Leavenworth, 30 Vt. 11 (1856). So, by supplying the omission of the word "date" in a note made payable "four months after," Pearson *v.* Stoddard, 9 Gray 199 (1857); or the word "months" in a note payable "twenty-four after date," Conner *v.* Routh, 7 How. 176 (Miss. 1843); Nichols *v.* Frothingham, 45 Me. 220 (1858). So, by supplying a reasonable time of payment in the case of a blank acceptance, Rogers *v.* Poston, 1 Mete. 643 (Ky. 1858).

⁷Waldron *v.* Young, 9 Heisk. 777 (1872); Witte *v.* Williams, 8 So. Car. 290 (1876); Elliott *v.* Levings, 54 Ill. 213 (1870); Johns *v.* Harrison, 20 Ind. 317 (1863).

⁸Hunt *v.* Adams, 6 Mass. 519 (1810). So, the omission of the word "months," Loomis *v.* Freer, 4 Bradw. 547 (1879); McLean *v.* Nielsen, 3 V. L. R. 107 (1877). But parol evidence was rejected to show the intention and clear up the meaning of a note payable "in one from the first of October in cattle or in grain the first of January following," Wainwright *v.* Straw, 15 Vt. 215 (1843).

or "on the first day of March, eighteen (hundred and) sixty-eight."¹

The *place of payment* may also be left blank and afterwards filled by the holder;² although it has been held that this could not be done in a sealed bond which had been stolen before the blank was filled.³ And where no blank has been left for that purpose, there can be no implied authority to insert a place of payment.⁴ But it has been held that a blank acceptance authorizes the holder to write over the acceptor's signature a special acceptance payable at a particular place and that this act will not avail to discharge an accommodation indorser.⁵

The *rate of interest* also may be left blank and filled in by the holder;⁶ although the payee can recover in such case no higher rate than that agreed on by the maker.⁷ As in other parts of a bill or note, a mere omission or mistake will be supplied to complete the interest clause, *e. g.* an omission of the word "interest" in a note payable "with ten per cent."⁸

§ 187. Blank Amount—Authority Exceeded.—Disputes as

¹Massie v. Belford, 68 Ill. 290 (1873).

²Redlich v. Doll, 54 N. Y. 234 (1873); McGrath v. Clark, 56 *Ib.* 34 (1874); Kitchen v. Place, 41 Barb. 465 (1864); Waggoner v. Eager, 8 Hun 142 (1876); Marshall v. Drescher, 68 Ind. 359 (1879); Shepard v. Whetstone, 51 Iowa 457 (1879). And such filling of a bank name in a note payable "at the — bank," &c., brings the note within the statute of Indiana requiring notes to be payable at a certain bank in order to be governed by the *lex mercatoria*, Gillaspie v. Kelly, 41 Ind. 158 (1872).

³Ledwich v. McKim, 53 N. Y. 307 (1873). And where the amount payable on a railroad bond depends by its terms on the place of payment to be indorsed on the bond by the president of the company, a printed indorsement for that purpose signed but left blank cannot be filled by the holder and the bond is non-negotiable for want of certainty in that respect, Parsons v. Jackson, 9 Otto 434 (1878).

⁴Simpson v. Stackhouse, 9 Penna. St. 186 (1848); Morehead v. Parkersburg Nat. Bank, 5 W. Va. 74.

⁵Todd v. Bank of Kentucky, 3 Bush 626 (1868). But such words added without the acceptor's authority discharge him, Burchfield v. Moore, 25 Eng. L. & Eq. 123 (1854); Taylor v. Moseley, 6 C. & P. 273; Mackintosh v. Hayden, Ry. & M. 362; Desbrow v. Weatherley, 6 C. & P. 758; Cowie v. Halsall, 4 B. & Ald. 197.

⁶Visher v. Webster, 8 Cal. 109 (1857).

⁷Fisher v. Dennis, 6 Cal. 577 (1858).

⁸Thompson v. Hoagland, 65 Ill. 310 (1872); or "at ten per cent.," Gramer v. Joder, *Ib.* 314. So the omission of the word "*per*" will be cured in the phrase "with ten (*per*) cent. interest from date," Williams v. Baker, 67 Ill. 238 (1873).

to blanks filled after execution have arisen most frequently in relation to the *amount* provided by the instrument to be paid. As in other cases, the execution of a bill or note for a blank amount implies an unlimited authority to the holder to fill the blank with any amount.¹ A mere omission by mistake of the word "dollars," "pounds," &c., will be, of course, supplied as in other similar cases.² The authority to fill a blank amount is generally limited, in England, by the amount of the stamp on the paper. It may also be limited by marginal figures on the paper, in which case the figures must not be exceeded.³ And if the amount is made larger in the writing, it will effect the discharge of a surety as an alteration of the instrument.⁴ So, tearing off the marginal

¹Chitty 38; 1 Edwards § 91; 1 Parsons 109; Griggs v. Howe, 31 Barb. 100 (1860); Fullerton v. Sturges, 4 Ohio St. 529 (1855); Frazier v. Gains, 2 Baxt. 92 (1872); Hall v. Bank of Commonwealth, 5 Dana 258 (1837); Bank of Limestone v. Penick, 5 T. B. Mon. 25 (1821); Bank of Commonwealth v. Curry, 2 Dana 142 (1834); Frank v. Lilienfeld, 33 Gratt. 377 (1880). And a holder of such paper for moneys to be advanced may fill it to the amount designated by the marginal figures after making advances beyond that sum, Carson v. Hill, 1 McMullen 76 (1840). And an indorser before delivery will be liable in such case to a payee taking the note in good faith, though the power to fill the blank be exceeded, Diercks v. Roberts, 13 So. Car. 338 (1879). But if the amount depends on the filling of a blank for percentage of attorney's commissions to be specially agreed on, it cannot be filled except by a subsequent agreement of the parties, Johnston v. Speers, 92 Penna. St. 227 (1879).

²Sweetser v. French, 13 Metc. 262 (1847); Corgan v. Frew, 39 Ill. 31 (1865); Williamson v. Smith, 1 Coldw. 1 (1860); Booth v. Wallace, 2 Root 247 (1795); Northrop v. Sanborn, 22 Vt. 433 (1850); Murrill v. Handy, 17 Mo. 406 (1853). Especially where the dollar mark (\$) accompanies the correct figures in the margin, McCoy v. Gilmore, 7 Ohio 268 (1835); Sweetser v. French, 13 Metc. 262 (1847). So, "hund." for *hundred*, Glenn v. Porter, 72 Ind. 525 (1880); or "fife" for *five*, Ohm v. Yung, 63 Ib. 432 (1878). But this cannot be done in a special bail-bond, Spencer v. Buchanan, Wright 583 (Ohio 1834). And see, *contra*, as to a promissory note, Brown v. Beebe, 1 D. Chip. 227 (1814).

³Boyd v. Brotherson, 10 Wend. 93; Norwich Bank v. Hyde, 13 Conn. 279 (1839); Carson v. Hill, 1 McMull. 76. And where the figures in the margin were "\$334," and the note was drawn for "three hundred dollars," it was held that the blank might be filled up to the amount indicated by the figures, Clute v. Small, 17 Wend. 238 (1837). But see, *contra*, Saunderson v. v. Piper, 5 Bing. N. C. 425 (1839).

⁴Henderson v. Bondurant, 39 Mo. 369 (1867). But in Shryver v. Hawkes, 22 Ohio St. 308 (1872), it was held that the marginal figures were no part of a note and that the alteration of them and the filling up of the blank for a higher amount would not invalidate the instrument as to a surety. This is certainly the rule where the alteration is made possible by the maker's negligence, *e. g.* where the amount was left blank, except a marginal memorandum of "\$500," and this was altered to \$5,000 and the blank filled for that amount, the maker was held liable to a *bona fide* holder for such increased amount, Woolfolk v. Bank of America, 10 Bush 504 (1874).

figures and filling up the blank for a larger sum amounts to a material alteration and discharges the maker.¹

Where negotiable paper has been executed with the amount blank, it is no defense against a *bona fide* holder for value for the maker to show that his authority has been exceeded in filling such blank and a greater amount written than was intended.² This was also once held to be the rule where no blank had been actually left, but the maker had negligently left a space either before or after the written amount which made it easier for a holder fraudulently to enlarge the sum first written.³ It has now, however, become in America an established rule that, if the instrument was complete without blanks at the time of its delivery, the fraudulent increase of the amount by taking advantage of a space left without such intention, although it may be negli-

¹ Hall v. Commonwealth, 5 Dana 258 (1837).

² 1 Daniel 146; 1 Parsons 33, 109; Collis v. Emmett, 1 H. Bl. 313; Russell v. Langstaffe, Dougl. 496, 514; Snaith v. Mingay, 1 M. & S. 87; Leslie v. Hastings, 1 M. & Ry. 119; Molloy v. Delves, 7 Bing. 428; S. C., 5 M. & P. 275; S. C., 4 C. & P. 492; Barker v. Stearne, 9 Exch. 684; Van Duzer v. Howe, 21 N. Y. 531 (1860); Griggs v. Howe, 31 Barb. 100 (1860); Herbert v. Huie, 1 Ala. 18 (1840); Decatur Bank v. Spence, 9 Ib. 800 (1846); Hall v. Bank of the Commonwealth, 5 Dana 258 (1837); Chemung Canal Bank v. Bradner, 44 N. Y. 680 (1871); Johns v. Harrison, 20 Ind. 317 (1863); Frazier v. Gains, 2 Baxt. 92 (1872); McArthur v. McLeod, 6 Jones 475 (1859); Smith v. Lockridge, 8 Bush 423 (1871); Wilson v. Kinsey, 49 Ind. 35 (1874); Abbot v. Rose, 62 Me. 194 (1873); Bank of Commonwealth v. Curry, 2 Dana 142 (1834); Bank of Limestone v. Penick, 5 T. B. Mon. 25 (1821); Young v. Ward, 2 Ill. 223 (1859); Jones v. Shelbyville Ins. Co., 1 Mete. 58 (Ky. 1858); Nichol v. Bate, 10 Yerg. 429 (1837); Waldron v. Young, 9 Heisk. 777 (1872); Joseph v. National Bank, 17 Kans. 256 (1876); Huntington v. Bank of Mobile, 3 Ala. 186 (1841). And an accommodation indorser before delivery will be liable in like manner to a payee, having no notice of the extent of his agreement with the maker, and taking the note for value, Diercks v. Roberts, 13 So. Car. 338 (1879).

³ Pothier Contrat du Change, p. 1 c. 4 § 99; Young v. Grote, 4 Bing. 253 (1827), where blank checks had been left by a banker with his wife and the amount filled in by her in such a manner that the clerk with whom she intrusted it was enabled fraudulently to add £300 to the amount written. So, too, Garrard v. Haddan, 67 Penna. St. 82 (1870); Isnard v. Torres, 10 La. An. 103 (1855). And this principle has been applied to checks in cases arising between banker and customer, Swan v. North British Australian Co., 2 H. & C. 179; Halifax Union v. Wheelwright, L. R. 10 Exch. 183 (1875). But see a review of these cases in Greenfield Savings Bank v. Stowell, 123 Mass. 196. And see remarks on Young v. Grote, in Roberts v. Tucker, 16 Q. B. 560; Bank of Ireland v. Evans Charities, 5 H. L. C. 389, 410; Orr v. Union Bank of Scotland, 1 Macq. 513; British Linen Co. v. Caledonian Ins. Co., 4 Macq. 107; *Ex parte* Swan, 7 C. B. (N. S.) 400; Arnold v. Cheque Bank, L. R. 1 C. P. D. 578 (1876).

gently, will constitute a material alteration and operate to discharge the maker.¹ And a holder having notice that the maker's authority has been exceeded cannot recover on the instrument.² In Mississippi, however, such holder is allowed to recover the amount actually authorized by the maker.³ And, in general, if the holder knows that the instrument was executed in blank, but not that the maker's authority was exceeded in filling the blank, he has not such notice as will subject him to defenses on that ground.⁴ The mere discounting of a note with such a blank raises no presumption against the *bona fides* of the holder.⁵

¹Goodman v. Eastman, 4 N. H. 455 (1828); Worrall v. Gheen, 39 Penna. St. 388 (1861); Wade v. Withington, 1 Allen 561 (1861); Greenfield Savings Bank v. Stowell, 123 Mass. 196 (1877). In this case Gray, C. J., says (p. 206) of Garrard v. Haddan, 67 Penna. St. 82: "We cannot regard as authoritative the expression of opinion that the maker was liable upon the note as altered for several reasons: 1st. It was purely extra-judicial, for the plaintiff had sued out no writ of error. 2d. It relies upon the Scotch decisions which the same court, in Worrall v. Gheen, had declined to follow. 3d. It avowedly rejects the distinction taken by this court in Wade v. Withington, 1 Allen 561, above cited, restricting such liability to cases in which the alteration is made by an agent, clerk or other person in whom the maker has reposed confidence. 4th. It asserts that no such restriction was made in Putnam v. Sullivan, 4 Mass. 45, in direct contradiction of the statement of Chief Justice Parsons in that case, quoted in the early part of this opinion. 5th. It inaccurately states that Worrall v. Gheen 'was a case of a perceptible alteration,' whereas that case, as already mentioned, expressly found that 'the fraud was so well executed that the appearance of the note was not such as to excite the suspicions of a man in ordinary business;' and according to the opinion in Phelan v. Moss, 67 Penna. St. 59, delivered on the same day as that in Garrard v. Haddan, the only material question was whether the indorsee took it in good faith." On the other hand, Worrall v. Gheen is not followed so far as it permitted a recovery of the original amount, as it was before the alteration, Neff v. Horner, 63 Penna. St. 327; Draper v. Wood, 112 Mass. 315; Citizens' Nat. Bank v. Richmond, 121 *Ib.* 110; Wade v. Withington, 1 Allen 561.

²Davidson v. Lanier, 4 Wall. 447 (1866); Clower v. Wynn, 59 Ga. 246 (1877); Johns v. Harrison, 20 Ind. 317 (1863); Smith v. Lockridge, 8 Bush 423 (1871); McCoy v. Gilmore, 7 Ohio 268 (1835); Grant v. Brotherton, 7 Mo. 458 (1842); Murrill v. Handy, 17 *Ib.* 406 (1853); Coolbroth v. Purinton, 29 Me. 469 (1849); Booth v. Wallace, 2 Root 247 (1795).

³Hemphill v. Bank of Alabama, 6 Sm. & M. 44 (1846); Johnson v. Bladale, 1 Sm. & M. 17 (1843); Goss v. Whitehead, 33 Miss. 213 (1857).

⁴Huntington v. Bank of Mobile, 3 Ala. 186 (1841). But it was held in Awde v. Dixon, 6 Exch. 869 (1851), that one who signed a note with the payee's name in blank, and delivered it to another to be delivered when it had been signed by a third person, was not liable to another who took it in ignorance of such agreement, which had not been carried out, but with payee's name still blank; Parke, B., saying: "It is a fallacy to say that the plaintiff is a *bona fide* holder for value; he has taken a piece of blank paper, not a promissory note."

⁵Chemung Canal Bank v. Bradner, 44 N. Y. 680.

§ 188. **Blank Indorsements.**—Commercial paper may be indorsed in blank, at least by the law of England and of most of the United States. The meaning of such contract by blank indorsement is fixed by the mercantile law and the implied authority is to write such a contract and no other. Thus, the holder may write over the indorser's signature a promise to pay the note according to its tenor.¹ Such indorser is at common law only an indorser and as such is entitled to due notice of protest of the bill or note. And this has been expressly provided by statute in Massachusetts.² The indorsee cannot change this liability by writing over the indorser's signature a contract of guaranty.³ It seems, however, that his doing so will not make the indorsement void as a transfer of the paper.⁴ Nor will an additional agreement as to other matters affect the indorsee's right to fill a blank indorsement with his name or that of a third person.⁵ What is the effect and meaning of the contract made by a blank indorsement, and how far the intention of the parties may be shown by parol evidence for the purpose of explaining or modifying such contracts, are matters to be discussed in a later part of this work.

§ 189. **Blanks—American and Foreign Statutes.**—The common law has not been changed by American statute in respect

¹*Sweetser v. French*, 13 Metc. 262 (1847).

²Mass. Stat. 1874 c. 404; *Cook v. Googins*, 126 Mass. 410. An indorser in blank within two days after the first delivery of a note has been held in Massachusetts as an original promisor, *Moies v. Bird*, 11 Mass. 436 (1814). But such original promise cannot be inferred from a blank indorsement nine months after date, *Tenney v. Prince*, 4 Pick. 386 (1826).

³*Seabury v. Hungerford*, 2 Hill 80 (1841); *Hall v. Newcomb*, 7 *Ib* 416 (1844), overruling *Nelson v. Dubois*, 13 Johns. 175 (1816); *Beattie v. Browne*, 64 Ill. 360 (1872); *Schnell v. North Side P. M. Co.*, 89 *Ib*. 581 (1878); *Howe v. Merrill*, 5 Cush. 80 (1849). But see, *contra*, as between the original parties, *Worden v. Salter*, 90 Ill. 160 (1878), *Sheldon, J., dissenting*; *Clayes v. White*, 65 *Ib*. 357 (1872); *Chandler v. Westfall*, 30 Tex. 475 (1867); *Fuller v. Scott*, 8 Kans. 25 (1871). See, also, *Tenney v. Prince*, 4 Pick. 386 (1826); *Moies v. Bird*, 11 Mass. 436 (1814). And where the indorsement was made after the maturity of a note and for the purpose of guaranteeing it, the holder may write a guaranty over the indorser's signature, *Rivers v. Thomas*, 1 B. J. Lea 649 (1878).

⁴*Croskey v. Skinner*, 44 Ill. 321 (1867); *Beattie v. Browne*, 64 Ill. 360 (1872); *Hance v. Miller*, 21 Ill. 636 (1859)—but in this case it was held that the insertion of the guaranty itself was not *prima facie* unauthorized.

⁵*Leland v. Parriott*, 35 Iowa 454 (1872).

to blanks. It has in part become statute law in a few of the States.¹ On the other hand, it seems that the many foreign statutes, referred to in other parts of this work, requiring commercial paper to be dated and to express amount, names, time and place of payment, &c., amount to a prohibition of blanks in the several particulars required to be expressed.² Blanks as to the payee's name are provided for by statute in the Argentine Republic and in Lower Canada.³ Blank indorsements are prohibited by statute in most of the countries that follow the Spanish Commercial Code;⁴ or the Code Napoleon.⁵ In some other countries they are permitted—sometimes restricting the efficacy of a blank indorsement to a mere power of attorney to collect the bill.⁶

¹In *California* "one, who makes himself a party to an instrument intended to be negotiable, but which is left wholly or partly in blank for the purpose of filling afterwards, is liable upon the instrument to an indorsee thereof in due course in whatever manner and at whatever time it may be filled, so long as it remains negotiable in form" (Civ. Code 1872 § 8125). In *Dakota* the same provision is made (Rev. Code 1877 § 1854). In *Kentucky* the holder of a promissory note payable to the maker's own order and indorsed by the maker in blank may fill the blank indorsement with a fresh promise to pay (1877 G. S. c. 22 § 13).

²In *Russia* blanks on stamped paper are expressly forbidden (1832 Exch. Law Art. 542).

³If the payee's name is left blank any *bona fide* holder may insert his own, in the *Argentine Republic* (Code Com. 1862 Art. 776), or may fill it with the name of another in *Lower Canada* (1867 Civ. Code § 2282).

⁴Blank indorsements are forbidden in *Spain* (1829 Code Com. Art. 471); *Colombia* (1853 Code Com. Art. 428); *Costa Rica* (1853 Code Com. Art. 418); *Ecuador* (see Spanish Code); *Mexico* (1854 Code Com. Art. 364); *Peru* (1853 Code Com. Art. 429).

⁵The *Code Napoleon* requires all indorsements to state the name of the indorsee (§ 137). This law applies to Belgium, France, Greece, Hayti, Turkey and the Canton of Geneva. So, too, in *Italy* (1865 Code Com. Art. 223).

⁶Indorsement in blank is permitted by statute in: *Brazil* (Code Com. 1850 Art. 362); *Chili* (Code Com. 1865 Art. 661), in which case and notwithstanding want of date the indorsement implies consideration and effects a transfer; *Denmark* (Act 1843 § 2). So, too, in *Russia*, but such indorsements cannot prove themselves (1832 Exch. Law Art. 560). Regular indorsements must contain name of indorsee and time and place of indorsement (*Ib.* 559). So, too, in *Switzerland* (Basle, Law of 1863 § 12; Berne, Law of 1859 § 12; and many other cantons). In these places a blank indorsement may be filled by the holder, but the instrument can be further indorsed and transferred without that. In *Hungary* a blank indorsement is a mere power of attorney for collection (1860 Exch. Law § 34); but when once filled up the indorser cannot set up in defense that it was blank when delivered (*Ib.* § 35). In *Portugal* a blank indorsement without date is a mere power to collect (1833 Code Com. Art. 357). This is also the case in *Venezuela*, unless it be proved to have been intended for a transfer of the instrument (1862 Code Com. Art. 36).

IV. MEMORANDA AND CONTEMPORANEOUS AGREEMENTS.

- 190. *Memoranda on Back, Margin, &c.*
- 191. Expressing a Condition.
- 192. Relating to Time of Payment.
- 193. Place of Payment.
- 194. Amount—Marginal Figures.
- 195. Currency—Consideration—Interest.
- 196. Collaterals.
- 197. *Contemporaneous Agreements.*
- 199. How far Admissible.

§ 190. **Memoranda on Back, Margin, &c.**—It often becomes an important question whether a memorandum made upon the margin, back, bottom, or other part of a note or bill, is part of the instrument. It is said by Mr. Justice Byles, in his work on bills, that such a memorandum made before the completion of a bill by delivery is sometimes a part of it and sometimes not.¹ If, however, such memorandum was made at or before the execution of the instrument, it is generally held to be a part of it;² unless, indeed, it is a mere memorandum placed on the paper by way of ear-mark.³

The circumstances of the making of such a memorandum are a question of fact for the jury to determine;⁴ and parol evidence is admissible as to such facts, although the memorandum is *prima facie* contemporaneous with the instrument and forms part of it.⁵ But this has been held to be otherwise in the case of a memorandum on the back of a note, until proof was furnished of its being contemporaneous with

¹ Byles 155. See, too, Chitty 162.

² 1 Daniel 156; 2 Parsons 539; Dinsmore v. Duncan, 57 N. Y. 573; Benedict v. Cowden, 49 *Ib.* 396 (1872); Heywood v. Perrin, 10 Pick. 228 (1830); Shaw v. M. E. Society, 8 Metc. 223 (1844); Fletcher v. Blodgett, 16 Vt. 26 (1844); Falkenburgh v. Clark, 11 R. I. 278 (1876); Wilson v. Tucker, 10 *Ib.* 578 (1873); Farmers' Bank v. Ewing, 78 Ky. 264 (1880); Cushing v. Fifield, 70 Me. 50 (1879); Turnbull v. Thomas, 1 Hughes C. C. 172 (1875); Woodward v. Matthews, 15 Ind. 339 (1860); Corgan v. Frew, 39 Ill. 31 (1865); Johnson v. Heagan, 23 Me. 329 (1843); Polo Mfg. Co. v. Farr, 8 Neb. 379 (1879); Krouskop v. Shontz, 51 Wis. 204 (1881).

³ Byles 101; Chitty 163; 1 Daniel 159; Brill v. Crick, 1 M. & W. 232. A receipt for part payment and a memorandum of protest made are not part of a note and need not be included in a copy contained in the pleadings, Buhl v. Trowbridge, 42 Mich. 44 (1879).

⁴ Tuckerman v. Hartwell, 3 Me. 147 (1824).

⁵ Fletcher v. Blodgett, 16 Vt. 26 (1844).

the execution of the note.¹ And if the memorandum was made after the execution of the instrument, it forms no part of it.²

§ 191. **Memoranda Expressing a Condition.**—The memorandum is none the less a part of the note because its effect is to render its payment contingent, provided it be contemporaneous with the note.³ This is true of a condition written below the note on the same paper, and its alteration avoids the instrument.⁴ In like manner, a memorandum on the back of a note, “on condition that if any dispute shall arise respecting the fir, the note to be void,” is part of the note and renders it contingent and non-negotiable.⁵ So, a memorandum on the end of a note providing that “this note is subject to a contract made November, 1874.”⁶ So, a memorandum under the signature that the note is not to be paid, if a certain machine be not delivered, forms part of the note.⁷ Likewise a memorandum rendering the payment dependent on a certain contingency;⁸ or a memorandum below the signature that the note is not to be sued until a certain time.⁹

In like manner a statement printed on the margin of a note to the effect that it was given for a patent and was not to be paid until a certain specified profit was obtained, is part of the note; but an alteration made by cutting it off was held to be no defense to the maker, at suit of a *bona fide* holder, by reason of the maker's negligence in the matter.¹⁰ Again, where one of the makers of a note added to his sig-

¹ Bay v. Shrader, 50 Miss. 326 (1874).

² Byles 101; Stone v. Metcalfe, 1 Stark. 53; S. C., 4 Campb. 217; 33 and 34 Viet. c. 97 § 7.

³ Byles 100; 2 Parsons 517, 539; Story on Prom. Notes 24; at least between the original parties, 1 Edwards § 161.

⁴ Gerrish v. Glines, 56 N. H. 9 (1875).

⁵ Hartley v. Wilkinson, 4 M. & S. 25; S. C., 4 Campb. 127.

⁶ Cushing v. Fifield, 70 Me. 50 (1879).

⁷ Wait v. Pomeroy, 20 Mich. 25 (1870). So, in like position, a memorandum that the note shall be considered paid “when B. sells \$50 worth” of certain machines, State v. Stratton, 27 Iowa 420 (1869).

⁸ Henry v. Colman, 5 Vt. 402 (1833).

⁹ Franklin Savings Inst. v. Reed, 125 Mass. 365 (1878).

¹⁰ Zimmerman v. Rote, 75 Penna. St. 188 (1874).

nature the words "surety ninety days from date," these words were held to form part of the note.¹ But an agreement by the payee not to sell the note, indorsed on it, has been held not to be a part of the note and not to affect an indorsee's right to recover on it.² So, a memorandum on the back of a note expressing the payee's *desire* that indulgence should be given to the maker, is not a part of the note and does not constitute a condition.³

§ 192. **Memoranda as to Time of Payment.**—Memoranda qualifying a note or bill relate frequently to the time limited for its payment. Such a memorandum as to when the note falls due may correct an erroneous date;⁴ or may render the time of payment contingent, *e. g.* a memorandum on the back of the note, "when a dividend on said estate shall be declared," is construed as part of it.⁵ So, a like memorandum "not to compel payment but to receive when convenient."⁶ And the mere word "renewed" indorsed on a note has been held to have similar effect as part of the note.⁷ But an indorsement of the words "to be extended if desired by the makers," although part of the note, has been rejected as indefinite and immaterial.⁸

A memorandum at the bottom of a note, "not to be collected until T. takes it up, as the maker has paid said T. for the same," is a part of it and postpones its payment.⁹ So, a memorandum in the same position to the effect that the maker is "not to be compelled to pay said note before April

¹ *Ulmer v. Reed*, 11 Me. 293 (1834).

² *Leland v. Parriott*, 35 Iowa 454 (1872).

³ *Chitty* 163; *Stone v. Metcalfe*, 1 Stark. 53; S. C., 4 Campb. 217; 33 and 34 Vict. c. 97 § 7.

⁴ *Byles* 101; *Fitch v. Jones*, 5 El. & Bl. 238; *Fanshawe v. Peets*, 2 Hurlst. & N. 1.

⁵ *Effinger v. Richards*, 35 Miss. 540 (1858).

⁶ *Barnard v. Cushing*, 4 Metc. 230 (1842).

⁷ *Lime Rock Bank v. Mullett*, 34 Me. 547 (1854). But a similar indorsement, on an envelope containing the note, not signed, is no part of the note, *Central Bank v. Willard*, 17 Pick. 151 (1835).

⁸ *Krouskop v. Shontz*, 51 Wis. 204 (1881).

⁹ *Johnson v. Heagan*, 23 Me. 329 (1843).

1;”¹ or a memorandum on the back postponing payment “until the old mill is sold for a fair price;”² or relieving from the payment of the principal as long as the interest is paid;³ or, on the back of a negotiable municipal bond payable in twenty-nine years, making it due on default of interest coupons;⁴ or, on the back of a note, “to be paid when A. collects a certain note of B.”⁵ or, at the bottom of a note, “one-half payable in twelve months, the balance in twenty-four months.”⁶ But where such memorandum is in conflict with the tenor of a note and also with itself, *e. g.* the note being dated September 13th, payable four weeks from date, with the memorandum at the bottom, “due Oct. 12, Oct. 11,” it was rejected as repugnant and held to form no part of the note.⁷

§ 193. **Memoranda—As to Place of Payment.**—Such memorandum is also frequently made to designate a place of payment or indicate a change in the place named in the bill or note. Thus, a memorandum at the bottom of a bill in the words “Accepted to pay in Boston, A. F. Howe & Co.,” was held to indicate the office of A. F. Howe & Co., in Boston, as a place of payment and was construed as part of the bill.⁸ So, a marginal memorandum, “Payable at the Bank of America,” has been held to form a part of the note, and the addition of such a memorandum after the delivery of the note was held, therefore, to constitute a material alteration of the paper.⁹ Such a memorandum, however, pointing out

¹Franklin Sav. Inst. *v.* Reed, 125 Mass. 365 (1878).

²Blake *v.* Coleman, 22 Wis. 396 (1868).

³Oskaloosa College *v.* Hickock, 46 Iowa 237 (1877).

⁴Mayor, &c., *v.* City Bank, 58 Ga. 584 (1877). So, a like provision in a mortgage securing a note payable on its face in five years, Noell *v.* Gaines, 68 Mo. 649 (1878); Parks *v.* Cooke, 3 Bush 168 (1867).

⁵McCalla *v.* McCalla, 48 Ga. 503 (1873).

⁶Heywood *v.* Perrin, 10 Pick. 228 (1830); Wheelock *v.* Freeman, 13 *Ib.* 165 (1832).

⁷Way *v.* Batchelder, 129 Mass. 361 (1880), Ames, J., saying, p. 362: “Such a memorandum is repugnant and self-contradictory, and for that reason it is not to be considered as a part of the contract or sufficient to contradict the terms used in the body of the note.”

⁸Tuckerman *v.* Hartwell, 3 Me. 147 (1824).

⁹Woodworth *v.* Bank of America, 19 Johns. 391 (1821).

the place of payment has been held in England not to be part of the instrument.¹ And this has been held to be the rule in a recent case in Missouri, also.²

§ 194. **Memoranda of Amount—Marginal Figures.**—Marginal figures indicating an amount are frequently used, and, as has been seen, are sometimes required by statute. They avail to explain what is clearly an omission, *e. g.* of the word “pounds” or “dollars”;³ but are always controlled by the words naming the amount in the body of the instrument, if there is a discrepancy.⁴ Such figures are frequently used in giving a bill or note for a blank amount, their purpose being to limit the holder’s authority as to the filling in of the blank. In some cases these figures are held to be a part of the note, and erasing or tearing them off amounts, in such case, to an alteration of the instrument.⁵ In such case, filling the blank with a larger amount constitutes an alteration, discharging a surety who had delivered the paper with the marginal figures and the blank.⁶ It has been held, however, that such figures are no part of the note and that their alteration is not material.⁷

§ 195. **Memoranda—As to Currency and other Means of Payment—Consideration—Interest.**—The *currency* or other means of payment is sometimes indicated by a memorandum of the sort already described, and such memorandum in general forms part of the instrument. This is true of the words “foreign bills” written at the bottom of a note, destroying its negotiability.⁸ So, of the words “in facilities”

¹ *Exon v. Russell*, 4 M. & S. 505.

² *American Nat. Bank v. Bangs*, 42 Mo. 450 (1868).

³ *McCoy v. Gilmore*, 7 Ohio 268 (1835); *Sweetser v. French*, 13 Metc. 262 (1847); *Corgan v. Frew*, 39 Ill. 31 (1865).

⁴ *Mears v. Graham*, 8 Blackf. 144 (1846). For foreign statutes to like effect, see Chap. IV., *supra*. In Iowa, marginal figures alone are not sufficient to support a recovery at law, *Hollen v. Davis*, 59 Iowa 444 (1882).

⁵ *Hall v. Bank of Commonwealth*, 5 Dana 258 (1837).

⁶ *Henderson v. Bondurant*, 39 Mo. 369 (1867).

⁷ *Shryver v. Hawkes*, 22 Ohio St. 308 (1872); *Woolfolk v. Bank of America*, 10 Bush 504 (1874); *Smith v. Smith*, 1 R. I. 398 (1850).

⁸ *Jones v. Fales*, 4 Mass. 245 (1808).

written under the signature;¹ or, "to be paid in notes of the Bank of Kentucky," written across the end;² or, "to be paid in wheat at ninety-five cents a bushel," written on the back;³ or, "payable in fulled cloth one year from the month of October next," written on the margin.⁴

In like manner, the memorandum may indicate the *consideration* of the note or the fund provided for its payment. Thus, a memorandum under the signature, "to be paid from profits of machines when sold," is a part of the note.⁵ Although it was held, in an early case in New York, that a contemporaneous indorsement showing the consideration of the note formed no part of it.⁶ But it is said that where a memorandum of this sort provides for payment in a certain way, *e. g.* "in labor, if made within six months," the provision expires with the limitation, and payment not having been made in that manner within the time limited, the provision is not afterwards a part of the note.⁷

Another common use of such memorandum is to provide for *interest* or for the periodical payment of interest. Thus, the words "with lawful interest," written on the corner of a note at the time of its execution, form part of it.⁸ And the subsequent addition of a provision for interest to be paid semi-annually, written on the face of a note, is a material alteration.⁹ But a memorandum written below the signature by the payee, in the words "when due, to draw fifteen per cent.," has been held to be no part of the note, in the absence of evidence as to when it was made.¹⁰

¹Springfield Bank *v.* Merrick, 14 Mass. 322 (1817).

²Osborne *v.* Fulton, 1 Blackf. 234.

³Polo Mfg. Co. *v.* Parr, 8 Neb. 379 (1879).

⁴Fletcher *v.* Blodgett, 16 Vt. 26 (1844).

⁵Benedict *v.* Cowden, 49 N. Y. 396 (1872).

⁶Sanders *v.* Bacon, 8 Johns. 485 (1811). The authority of this case has been questioned, so far as it holds the memorandum to be no part of the note, Benedict *v.* Cowden, 49 N. Y. 396 (1872).

⁷Odiorne *v.* Sargent, 6 N. H. 401 (1833).

⁸Warrington *v.* Early, 2 El. & Bl. 763. And the writing of such memorandum in the corner of a note constitutes a material alteration, *Ib.*

⁹Dewey *v.* Reed, 40 Barb. 17 (1863).

¹⁰Knowles *v.* Hill, 25 Ill 288 (1861).

§ 196. **Memoranda as to Collaterals.**—Memoranda of this sort to the effect that collateral security has been given have been held in England to form no part of a bill or note.¹ But in Massachusetts such a memorandum is part of the note;² although it cannot be construed as a notice to the holder of any agreement between joint makers or between maker and indorser for the deposit of such collaterals.³

So, too, a marginal memorandum, that the note is “given as collateral security with agreement,” is part of the note, and renders it contingent and non-negotiable, so that an indorsee cannot bring suit upon it.⁴ On the other hand, in England a similar provision on the back of the note, “for securing floating advances with lawful interest, commissions, &c.,” although part of the instrument, is held to be an agreement requiring an agreement stamp.⁵ But in an early case in New York, no longer followed, such a memorandum, indicating that a note was given as security for accommodation acceptances and was to be void if the drawer paid the bills accepted, was held not to be part of the note; and, although itself conditional, the note in question was held to be a negotiable one.⁶ The following memorandum on the back of a paper has also been held to form a part of it, being executed contemporaneously with it: “And the within note is taken for security for all such balances as J. M. may happen to owe T. L., not extending further than the within named sum of two hundred pounds, but this note is to be in force for six months and no money allowed to be called for sooner in any case.”⁷

So, too, a printed waiver on the back of a note of present-

¹Byles 101; *Wise v. Charlton*, 4 Ad. & El. 786; S. C., 6 Nev. & M. 364; S. C., 2 Har. & W. 49; *Fancourt v. Thorne*, 9 Q. B. 312.

²*Shaw v. M. E. Society*, 8 Metc. 223 (1844).

³*Fitchburg Sav. Bank v. Rice*, 124 Mass. 72 (1878).

⁴*Costelo v. Crowell*, 127 Mass. 293 (1879).

⁵*Cholmley v. Darley*, 14 M. & W. 344.

⁶*Tappan v. Ely*, 15 Wend. 362 (1836). So far as *Tappan v. Ely* held such memorandum to be no part of the note its authority was questioned in *Benedict v. Cowden*, 49 N. Y. 396.

⁷*Leeds v. Lancashire*, 2 Campb. 205.

ment, protest and notice of dishonor.¹ And an indorsement in these words: "This note is held by me for a note of B.," describing it, amounts to a notice to all purchasers that it is held merely as a collateral.²

§ 197. **Contemporaneous Agreements.**—Commercial paper is sometimes to be construed as one instrument with contemporaneous agreements executed on separate paper. This is so at least as to the original parties and all parties with notice of such agreement.³ Thus, a contemporaneous parol agreement, which is executed and not executory, may be construed with a note so as to defeat it.⁴

A collateral mortgage, executed contemporaneously with a note, may be in general construed as one instrument with it;⁵ especially if it be a mortgage executed to secure the note, referring in the body of it to the note as payable according to the tenor, &c.⁶ And where a note is made payable in four years with interest, not specifying when the interest is to be paid, and a contemporaneous mortgage securing it provides for the payment of interest annually, the two will be construed together, and the interest will be payable on the note annually.⁷ So, where several notes maturing at different times are all secured by a contemporaneous trust deed, which by its provisions postpones the maturity of all the notes until the last of them falls due, the instruments will be construed together.⁸ So, an agreement in a contemporaneous collateral mortgage, exempting from liability all other property of the

¹ *Farmers' Bank v. Ewing*, 78 Ky. 264 (1880).

² *National Security Bank v. McDonald*, 127 Mass. 82 (1879).

³ 1 Edwards § 164.

⁴ *Crosman v. Fuller*, 17 Pick. 171 (1835). And see, in general, *Davis v. Brown*, 4 Otto 423 (1876); *Davidson v. Hill*, 27 La. An. 149 (1875).

⁵ *Noell v. Gaines*, 68 Mo. 649 (1878); *Parks v. Cooke*, 3 Bush 168 (1867); *Muzzy v. Knight*, 8 Kans. 456 (1871); *National Bank v. Peck*, *Ib.* 661; *Richardson v. Thomas*, 28 Ark. 387 (1873).

⁶ *Dobbins v. Parker*, 46 Iowa 357 (1877). And such mortgage may be treated as a duplicate note, on which an action will lie after the Statute of Limitations has barred the note, *Grinnell v. Baxter*, 17 Pick. 386 (1835).

⁷ *Meyer v. Graeber*, 19 Kans. 165 (1877).

⁸ *Brownlee v. Arnold*, 60 Mo. 79 (1875).

maker of the note, forms one contract with the note.¹ So, a note made to "A. or —," may be explained by a collateral mortgage to be intended for *A. or bearer*.²

§ 198. In like manner a note given for an insurance premium will be construed with a contemporaneous receipt showing that fact;³ or with a like receipt providing for the surrender of the note on a certain contingency.⁴ And the maker of a note, at suit of an indorsee taking it after maturity, may avail himself of a contemporaneous agreement rendering the payment of the note conditional.⁵ So, when a note is made "subject to certain conditions contained in a written agreement of this date," the note and agreement will be construed as one contract.⁶ So, a note for property purchased and a contemporaneous agreement that the title shall not pass until the note is paid.⁷ So, a contemporaneous stipulation under seal for the conditional payment of the note out of the proceeds of a certain mine;⁸ or a note payable one day after date, with a contemporaneous writing providing for payment in five years;⁹ or a contemporaneous verbal agreement for the payment of a note in work;¹⁰ or in hides;¹¹ or in rent.¹² So, a contemporaneous agreement by a married woman charging her separate estate.¹³

§ 199. **Contemporaneous Agreements—When Admissible.—**

¹Richardson v. Thomas, 28 Ark. 387 (1873).

²Elliott v. Deason, 64 Ga. 63 (1879).

³Lawrence v. Griswold, 30 Mich. 410 (1874).

⁴Hunt v. Livermore, 5 Pick. 395 (1827).

⁵Munro v. King, 3 Col. 238 (1877); Rogers v. Broadnax, 24 Tex. 538 (1859).

⁶Titlow v. Hubbard, 63 Ind. 6 (1878).

⁷Third Nat. Bank v. Armstrong, 25 Minn. 531 (1878).

⁸Goodwin v. Nickerson, 51 Cal. 166 (1875).

⁹And in such case the Statute of Limitations will not begin to run until the expiration of the five years, Round v. Donnel, 5 Kans. 54 (1869).

¹⁰Singer Mfg. Co. v. Haines, 36 Mich. 385 (1879); Weeks v. Medler, 20 Kans. 57 (1878).

¹¹Hill v. Huntress, 43 N. H. 480 (1862). So, an indorsement "to be paid in wheat," Polo Mfg. Co. v. Parr, 8 Neb. 379 (1879).

¹²Bradley v. Marshall, 54 Ill. 173 (1870).

¹³Sherwood v. Archer, 10 Hun 73 (1877). So, too, Treadwell v. Archer, 76 N. Y. 196 (1879), reversing 10 Hun 73 on other grounds.

In like manner, where a note is made by one partner to another, it may be shown by a contemporaneous agreement to have been given to secure the payee against half the loss of the partnership capital, and recovery by him will be thereby limited to the amount of loss sustained.¹ But such contemporaneous agreement, to constitute one contract with the note or bill, must be between the same parties. Thus, a note by a contractor to A., payable on the completion of a building, will not be affected by a contemporaneous agreement between the contractor *and the county* for payment on its completion "according to the plan and specification on file," and the fact that the building was completed on another plan constitutes, therefore, no defense to the note.² Neither can a contemporaneous agreement be used to contradict and so defeat a note, *e. g.* by showing that a note payable to the administrator of A. was not to be paid, but was to be applied in satisfaction of a debt of A. to the maker.³

On the other hand, a contemporaneous verbal agreement is admissible to show a failure of consideration between original parties or parties with notice.⁴ In Colorado it has been held that a contemporaneous agreement set up in defense to a note or bill must be alleged to be in writing.⁵ A contemporaneous agreement for the discontinuance of a certain suit on payment of costs, although construed with a note, does not amount to a condition precedent to the payment of it.⁶ Neither does a contemporaneous warrant of attorney, although construed with a note, avail as an extension of the Statute of Limitations on the note.⁷

¹ *Rogers v. Smith*, 47 N. Y. 324 (1872).

² *Levally v. Harmon*, 20 Iowa 533 (1866).

³ *McDonald v. Elfes*, 61 Ind. 279 (1878).

⁴ *Smith v. Carter*, 25 Wis. 283 (1870).

⁵ *Peddie v. Donnelly*, 1 Col. 421 (1872).

⁶ *Bruce v. Carter*, 72 N. Y. 616 (1878).

⁷ *Walrod v. Manson*, 23 Wis. 393 (1868).

V. ADDITIONAL STIPULATIONS.

- 200. Stipulations for Interest—Exchange.
- 201. as to Charging Account, Returning Certificate,
 Waiving Protest, &c.
- 202. as to Collaterals.
- 203. Consideration.
- 204. Manner of Payment.
- 205. Attorney's Fees.
- 207. Warrant to Confess Judgment.
- 208. Other Agreements.

§ 200. **Provisions for Interest—Exchange.**—All definitions of commercial paper include the requirement that it shall be for the payment of money only. Instruments providing for such payment *and other objects* may be valid as agreements, but, in the absence of statutes to that effect, are not to be construed as negotiable and commercial instruments. Some additions, however, do not change the character of the paper by providing for any other act than the payment of money, and additions of this sort do not affect its negotiability or commercial character.

The most common addition of this kind is a clause providing for the payment of lawful *interest*. An instrument containing such clause may still be a valid bill of exchange.¹ In Austria such a clause does destroy the negotiable character of a bill, note, indorsement or other commercial contract.² While in Germany the clause itself is of no avail, and the bill or note is not affected by it.³

Another common addition, not in general affecting the negotiability of a bill of exchange, is a provision for *exchange* between the place of drawing and the place of payment.⁴ Such a provision is valid, at least, if it be not used as a sub-

¹Warrington v. Early, 2 El. & Bl. 763 (1853).

²Austria (1858 Ordinance No. 2).

³Germany (1861 Nuremb. Nov. No. 4).

⁴Johnson v. Frisbie, 15 Mich. 286 (1867); Smith v. Kendall, 9 Ib. 241 (1861); Leggett v. Jones, 10 Wis. 34 (1859); Sperry v. Horr, 32 Iowa 184 (1871); Grutacap v. Woulaise, 2 McLean 581 (1841). The contrary was, however, held in Read v. McNulty, 12 Rich. 445 (1860); Lowe v. Bliss, 24 Ill. 168 (1860); Russell v. Russell, 1 MacArth. 263 (1874).

terfuge to evade the usury laws.¹ But if so used it will be void.²

§ 201. **Common Phrases as to Charging, Waiver, Return of Certificate, &c.**—Another ordinary and immaterial addition to a bill of exchange is a request to *charge* the same to the account of the drawer or of some other person. Such request will not affect the negotiability of the bill.³ And a statement that the drawer will *credit* the payment in a particular way or on a particular account is likewise immaterial.⁴

In certificates of deposit the sum of money named is frequently made payable on *return of this certificate*, and their negotiability is not affected by this provision.⁵ But it would be if the provision also included the return of the maker's guaranty or of some other paper.⁶

Where a maker, after the usual words of promise in his note, added the words "which I am truly thankful for and shall never be forgotten by me," the instrument was held to be a negotiable note notwithstanding this addition.⁷ In like manner the expression "*ne varietur*," common in Louisiana notes, does not affect their negotiability.⁸ Other phrases frequently made use of in bills of exchange, without any effect upon the negotiability of the paper, are the following: "In case of need apply to Messrs. A. B., at C.;" "Return without protest;" "As per advice." So, expressions fixing a

¹Churchman v. Martin, 54 Ind. 380 (1876).

²Cornell v. Barnes, 26 Wis. 473 (1870).

³Mehlberg v. Fisher, 24 Wis. 607 (1869); Planters' Bank v. Evans, 36 Tex. 592 (1872); Petillon v. Lorden, 86 Ill. 361 (1877). But an order for payment out of a particular fund, "And this shall be your warrant for so doing and good as my receipt for said money," has been held to be interpreted as a mere non-negotiable receipt as shown on its face, Harriman v. Sanborn, 43 N. H. 128 (1861).

⁴Early v. McCart, 2 Dana 414 (1834).

⁵Frank v. Wessels, 64 N. Y. 155 (1876), overruling Patterson v. Poindexter, 6 Watts & S. 227; Cate v. Patterson, 25 Mich. 191 (1872).

⁶Smilie v. Stevens, 39 Vt. 315 (1866).

⁷Ellis v. Mason, 2 Hill 295 n.; S. C., 1 Eng. Jur. 380.

⁸Fleckner v. Bank of United States, 8 Wheat. 338 (1823); Bank of Kentucky v. Goodale, 20 La. An. 50 (1863); Maskell v. Haifleigh, 8 Ib. 457 (1853); Nott v. Watson, 11 Ib. 664 (1856).

limit to the amount of exchange or expenses assumed.¹ There are also some statutory provisions on this subject.²

§ 202. **Phrases Referring to Collaterals.**—Another addition frequently occurring in bills and notes and not affecting their negotiability, is the mention or recital of collateral security.³ So, in like manner, a recital of collateral with a power of attorney authorizing its sale on non-payment of the note secured, has been held not to affect its negotiability.⁴ And even a promise coupled with such provisions and an agreement to pay any deficiency arising after such sale, has been held to leave the note still negotiable.⁵ In Texas a recital of a collateral security on real estate appears to entitle the note containing it to a decree of foreclosure like a mortgage.⁶ But it has been held that a stipulation contained in a bill of exchange, for the delivery of cotton to the acceptors, was in-

¹Chitty 186, 189. So, a waiver of relief from appraisement and exemption laws will not destroy the negotiability of a note, *Lyon v. Martin*, 31 Kans. 411 (1884).

²In *California* a non-negotiable option to perform some act in lieu of payment may be added without prejudice to the negotiability of an instrument (Civ. Code of 1872 § 8090). So, too, "a negotiable instrument may contain a pledge of collateral security with authority to dispose thereof" (*Ib.* § 8092), but "must not contain any other contract than such as is specified" above (*Ib.* § 8093). In *Dakota* the same provisions have been enacted (Rev. Code 1877 §§ 1824, 1826, 1827). In *Pennsylvania* the statute provides that all bills of exchange, notes, drafts, &c., made or indorsed in Pennsylvania payable elsewhere, "with the current rate of exchange in Philadelphia or such other place within this Commonwealth where the same may bear date, or in current funds or such like qualifications," shall be negotiable (1849 P. L. p. 427 § 11; 1872 *Purd. Dig.* p. 1173 § 2).

³Byles 11; 2 *Parsons* 147; *Wise v. Charlton*, 4 Ad. & El. 786; *Fancourt v. Thorne*, 9 Q. B. 312 (1846); *Branning v. Markham*, 12 Allen 454 (1866). So, *Collins v. Bradbury*, 64 Me. 37 (1874), where the note was said to be for a colt, which was "holden for the payment of the amount." So, where the note contains a statement that it is secured by deed of real estate, *Duncan v. Louisville*, 13 Bush 378 (1877). So, too, *Heard v. Dubuque Co. Bank*, 8 Neb. 10 (1878); *Potts v. Coal Co.*, 6 Phila. 249 (1867); *Knipper v. Chase*, 7 Iowa 145; *Towne v. Rice*, 122 Mass. 67 (1877). But a recital in a note that it was "given as collateral security with agreement" has been held to destroy its negotiability, so that an indorsee cannot sue on it in his own name, *Costello v. Crowell*, 127 Mass. 293 (1874).

⁴*Arnold v. Rock River V. R. R.*, 5 Duer 207 (1856); *Towne v. Rice*, 122 Mass. 67 (1877); *Haynes v. Beckman*, 6 La. An. 224 (1851).

⁵*Arnold v. Rock River V. R. R.*, 5 Duer 207 (1856); *First Nat. Bank v. Gray*, 18 So. Car. 282 (1882).

⁶*Slade v. Young*, 32 Tex. 668 (1870).

tended for their security only, and did not enure to the benefit of subsequent holders.¹

§ 203. **Additional Clauses Relating to Consideration.**—The recital in a note or bill of the consideration supporting it, is another common addition not affecting its negotiability.² Where the consideration is in the nature of an executory agreement, *e. g.* a promise to pay A. a certain sum for a suit of clothes ordered by B., the instrument is not a promissory note.³

On the other hand, the recital of an executed consideration, however full, will not destroy the character of the paper as a note. Thus, a promise “in consideration of his foregoing and forbearing an action for damages, ascertained by consent to amount to that sum, by reason of injuries sustained by his wife in respect of my non-repair of a foot-way,” may still be a good promissory note.⁴ So, a recital in a bill of exchange, “which is due me for the wagon bought last Spring,” leaves it still a bill of exchange.⁵ So, in a premium note for insurance the words, “On policy No. 33,” will not affect its negotiability, although the policy provided for a set-off of the note against any loss that might occur.⁶ So, too, the statement in a note that it is given “towards the right of way and grading of said railroad,” is immaterial;⁷

¹Ware v. City Bank, 59 Ga. 840 (1877).

²Collins v. Bradbury, 64 Me. 37 (1874); Kirk v. Dodge Co. Mut. Ins., 39 Wis. 138 (1875); Preston v. Whitney, 23 Mich. 260 (1871); Union Ins. v. Greenleaf, 64 Me. 123 (1874); Wallace v. Dyson, 1 Speers 127 (1804); Doherty v. Perry, 38 Ind. 15 (1871). And a note for \$40 “profits” has been construed to refer to profits growing out of some past transaction and to be negotiable, Matthews v. Crosby, 56 N. H. 21 (1875).

³Jarvis v. Wilkins, 7 M. & W. 410. But where a note provided that the contents were “to be appropriated to the payment of A.’s mortgage to B.,” and the mortgage was afterwards paid in another manner, the note was held to be negotiable, Treat v. Cooper, 22 Me. 203 (1842). So, where an order for a safe contained a promise to pay for it a certain amount at a certain time, it was held to be a note within the Revised Statutes of Maine, Morris v. Lynde, 73 Me. 88 (1881).

⁴Shenton v. James, 5 Q. B. 199 (1843). So, a note reciting that it was given as a “part payment on the plantation as per agreement of February 14th, ’74,” has been held to be negotiable, Bank of Sherman v. Apperson, 4 Fed. Rep. 25 (1880).

⁵Wells v. Brigham, 6 Cush. 6 (1850).

⁶Taylor v. Curry, 109 Mass. 36 (1871).

⁷Wright v. Irwin, 33 Mich. 32.

or in consideration of a judgment to be assigned;¹ or even the statement "which when paid will be in full of a judgment," &c.² So, a clause stating that the note is given "to satisfy an attachment against A. B., whose receipt will be good against said due-bill."³ So, a statement to the following effect, "being in part payment for a portable engine, which engine shall be and remain the property of the owner of this note until the amount hereby secured is fully paid."⁴

Some of these cases, however, appear to overstep the line of a mere recital of consideration. On the other hand, it has been held that an agreement for the purchase of a saw-gin "for which I promise to pay," &c., is plainly not a promissory note.⁵ And in Louisiana a bill of exchange containing the words "according to a donation made to the parish, the same to be in accordance with a resolution of the police jury," was held to be conditional and therefore not negotiable.⁶

§ 204. **Agreements as to Manner of Payment.**—The following agreements, though seeming to add somewhat to the simple contract made by the note, have been held not to render it conditional nor to affect its negotiability in any way, *e. g.* a note for the payment of money "or in goods on demand."⁷ So, too, a note containing an alternative "to issue stock for it" on its surrender.⁸ But a note for the payment of money, concluding with the clause "for which I am to receive stock of said company," has been held to be an agreement and not a negotiable note.⁹ On the other hand, a note for money, with the provision that "it may be

¹ *Sanders v. Bacon*, 8 Johns. 485 (1811).

² *Ellett v. Britton*, 6 Tex. 229 (1851).

³ *Bowie v. Foster*, Minor 264 (1824).

⁴ *Mott v. Havana Nat. Bank*, 22 Hun 354 (1880).

⁵ *Hodges v. Hall*, 5 Ga. 163 (1848).

⁶ *Jenkins v. Caddo*, 7 La. An. 559 (1852).

⁷ *Hosstatter v. Wilson*, 36 Barb. 307 (1862).

⁸ *Hodges v. Shuler*, 22 N. Y. 114 (1860); *Hotchkiss v. Nat. Banks*, 21 Wall. 354 (1874).

⁹ *Considerant v. Brisbane*, 6 Duer 686; 14 How. Pr. 487 (1857).

paid by release of payee from indorsement" of another note, has been held to be negotiable.¹

A note payable in installments, with a provision that the whole shall become due on default in any installment, is none the less a negotiable note.² Although the contrary has been held as to the effect, on a negotiable railroad bond, of a clause reserving to the maker the right to pay the sum mentioned before maturity with twenty per cent. discount.³ So, too, a condition postponing the payment of a note until the happening of a certain contingency, has been held to render the note a mere agreement.⁴ Of the same force is a stipulation in a note for its payment to a third person, if so indorsed on the note held by him.⁵

§ 205. **Stipulation for Attorney's Fees.**—The effect of a stipulation for attorney's fees or costs of suit contained in a note has been the subject of much consideration, more especially in our Western States. As an agreement, and irrespective of usury laws and other statutory prohibitions, such a stipulation is in itself valid.⁶ And the fees so stipulated for may be recovered by the holder of the note, although not the original payee.⁷ And where a stipulation of this sort is contained in a bill of exchange, it has been held to be embraced in the liability assumed by the acceptor.⁸ The fees provided for must, however, be proved, if the amount be not

¹ *Pool v. McCrary*, 1 Ga. 319 (1846).

² *Carlton v. Kenealy*, 12 M. & W. 139 (1843); *Miller v. Biddle*, 13 L. T. R. 334 (Exch. 1865).

³ *Chouteau v. Allen*, 70 Mo. 290 (1879).

⁴ *Blake v. Coleman*, 22 Wis. 396 (1868).

⁵ *Bunker v. Athearn*, 35 Me. 364 (1853).

⁶ *Meacham v. Pinson*, 60 Miss. 217 (1882); *Brown v. Barber*, 59 Ind. 533 (1877); *First Nat. Bank v. Breese*, 39 Iowa 610 (1874); *Garver v. Pontious*, 66 Ind. 191 (1879); *Mathews v. Norman*, 42 *Ib.* 176 (1873); *Sinker v. Fletcher*, 61 *Ib.* 276 (1878); *Smiley v. Meir*, 47 *Ib.* 559 (1874); *Maynard v. Mier*, 85 *Ib.* 317 (1882); *Miner v. Paris Exch. Bank*, 53 Tex. 559 (1880). A statute was passed in Indiana in 1875 (1 R. S. 1876 p. 149) declaring conditional stipulations for attorney's fees in promissory notes to be void. It does not apply to unconditional agreements, *Garver v. Pontious*, *supra*.

⁷ *Johnson v. Crossland*, 34 Ind. 334 (1870). Such stipulation passes with the note on its transfer, *Bank of British North America v. Ellis*, 2 Fed. Rep. 44 (1880).

⁸ *Smith v. Muncie Nat. Bank*, 29 Ind. 158 (1867).

specified in the note.¹ And where "reasonable attorney's fees" are provided for, it is error to render judgment for such fees without any evidence determining their amount.² An agreement in a note to pay attorney's fees for its collection is not conditional, unless made dependent on some contingency other than mere collection.³

In some States, however, such a stipulation is held to be against public policy and void as a mere makeshift to evade the laws against usury.⁴ And fees of this sort, although expressly stipulated for, cannot be recovered on a usurious note.⁵

It may be said in general that such a stipulation for fees does not affect the negotiability of the note containing it;⁶ even though the stipulation be restricted to the case of suit being brought on the instrument.⁷ And a stipulation for fees, "if suit be instituted," is binding upon the indorser of the note as well as the maker.⁸ Where a note provides for the payment of fees in case of suit, making a claim against the estate of the deceased maker, if the claim be contested, is sufficient to entitle the holder to recover fees.⁹

¹Wyant v. Pottorff, 37 Ind. 512 (1871).

²First Nat. Bank of Muscatine v. Krance, 50 Iowa 235 (1878).

³Tuley v. McClung, 67 Ind. 10 (1879).

⁴Myer v. Hart, 40 Mich. 517 (1879); State v. Taylor, 10 Ohio 378 (1841); Boozer v. Anderson, 42 Ark. 167 (1883). So, in case of a like stipulation contained in a warrant of attorney, Shelton v. Gill, 11 Ohio 417 (1842). And such stipulation in a note has been held void as not authorized by law, Dow v. Updike, 11 Neb. 95 (1881); or as providing without consideration for a penalty or forfeiture, Merchants' Nat. Bank v. Levier, 14 Fed. Rep. 662 (1882).

⁵Miller v. Gardner, 49 Iowa 234 (1878); Code of Iowa § 2080.

⁶1 Daniel 66; 2 Parsons 147; Dietrich v. Bayhi, 23 La. An. 767 (1871); Heard v. Dubuque Co. Bank, 8 Neb. 10 (1878); Kemp v. Klaus, *Ib.* 24; Sperry v. Horr, 32 Iowa 184 (1871); Smith v. Silvers, 32 Ind. 321; Stoneman v. Pyle, 35 *Ib.* 103 (1871); Proctor v. Baldwin, 82 *Ib.* 370 (1882); Maynard v. Mier, 85 *Ib.* 317 (1882); Seaton v. Scoville, 18 Kans. 433 (1877); Wilson S. M. Co. v. Moreno, 7 Fed. Rep. 806; 24 Alb. L. J. 336 (1879 U. S. C. Oregon); Adams v. Addington, 16 Fed. Rep. 89 (1883); Trader v. Chidester, 41 Ark. 242 (1883); S. C., 19 Cent. L. J. 318. See, too, 14 Cent. L. J. 86.

⁷Gaar v. Louisville Banking Co., 11 Bush 180 (1874); Nickerson v. Sheldon, 33 Ill. 372 (1864); Stoneman v. Pyle, 35 Ind. 103 (1871); Howenstein v. Barnes, 9 Cent. L. J. 48; 5 Dillon 482 (1879); Peyser v. Cole, 19 Cent. L. J. 236; S. C., 4 Pac. Rep. 520 (Oregon S. C. 1884).

⁸Hubbard v. Harrison, 38 Ind. 323 (1871).

⁹Davidson v. Vorse, 52 Iowa 384 (1879).

So, if the stipulation be in conditional form, "should this be collected by legal process," it is still valid.¹ But it has been held, in Illinois, that where the stipulation is only to pay fees, if the note be not paid when due and be sued upon, the fees cannot be recovered in the original suit brought on the note, because not due by its terms *until* the suit is brought.²

§ 206. In opposition to the authorities already cited, it has been held that a stipulation for fees if the note be sued on destroys its negotiability;³ and that such provisions are contingent and cannot find place in a negotiable instrument.⁴ Such stipulations have also been held to be against public policy and void.⁵ So, likewise, in Michigan an agreement contained in a note for a gross sum for attorney's fees if not paid at maturity and for express charges.⁶ An agreement contained in a note for attorney's fees, "together with all taxes and charges in the nature thereof that may be levied on this note," renders uncertain the amount to be paid and destroys the negotiability of the note.⁷ So, it has been held

¹ *McGill v. Griffin*, 32 Iowa 445 (1871).

² *Easter v. Boyd*, 79 Ill. 325 (1875).

³ *Jones v. Radatz*, 27 Minn. 240 (1880). So, in *Wisconsin*, *First Nat. Bank v. Larser*, 18 Cent. L. J. 399 (Wis. S. C. 1884); and *Maryland*, *Maryland Fertilizing Co. v. Newman*, 60 Md. 584 (1883); and *Pennsylvania*, *Johnston v. Speer*, 92 Penna. St. 227 (1879); and *Missouri*, *First Nat. Bank v. Marlow*, 71 Mo. 618 (1880); *First Nat. Bank v. Gay*, *Id.* 627; *First Nat. Bank v. Jacobs*, 73 *Id.* 35 (1880). And for such provisions coupled with other agreements, see § 208, *infra*.

⁴ "If collected by attorney," *First Nat. Bank v. Gay*, 63 Mo. 33 (1876); "if not paid when due," *Woods v. North*, 84 Penna. St. 407 (1877). Especially, if uncertain in amount and other respects as well as contingent, *Hardin v. Olson*, 14 Fed. Rep. 705 (Minn. 1882).

⁵ *Witherspoon v. Musselman*, 14 Bush 214 (1878).

⁶ *Bullock v. Taylor*, 39 Mich. 137 (1878). As to the stipulation for fees Judge Cooley says, p. 141: "It is opposed to the policy of our laws concerning attorneys' fees, and it is susceptible of being made the instrument of the most grievous wrong and oppression. It would be idle to limit interest to a certain rate, if under another name forfeitures may be imposed to an amount without limit. The provision in these notes is as much void as it would have been had it called the sum imposed by its true name of penalty or forfeiture."

⁷ *Farquhar v. Fidelity Ins. Co.*, 18 Alb. L. J. 330 (1878), U. S. C. C. Penna.; S. C., 13 Phila. 473; *First Nat. Bank v. Bynum*, 84 N. C. 24 (1881). Especially where left blank as to percentage, *e.g.* "with — per cent. attorney's fees, if collected," *Johnston v. Speer*, 92 Penna. St. 227 (1879).

in Missouri that a note containing a stipulation for specified attorney's fee if the note be not paid when due, and also a warrant to enter judgment on the note, is not a negotiable note.¹ This has also been held in a recent case in Pennsylvania.²

§ 207. **Warrant to Confess Judgment.**—What effect a warrant to confess judgment contained in a note will have upon its negotiability, is still perhaps an unsettled question;³ although it has been held in Ohio that the note remains negotiable, but that its negotiability does not extend to the warrant or power of attorney contained in it.⁴ So, it has been held that a waiver of right of appeal, and of all valuation, appraisal, stay and exemption laws, did not affect the negotiability of the note containing it.⁵ And the same has been held of a power contained in a note to issue execution in case of non-payment.⁶ On the other hand, a warrant for judgment contained in a note has been held in Pennsylvania to destroy its negotiability;⁷ and so, also, a like warrant with release of errors and waiver of stay and exemption laws.⁸ In Missouri, too, a note containing a stipulation for attorney's fees and a warrant to enter judgment in case of default, is held not to be negotiable;⁹ as also a stipulation for attorney's fees with a waiver of all exemptions.¹⁰

§ 208. **Other Agreements.**—If the additional clause provides, as has been said, for some object quite distinct from the payment of money, it destroys the character of the instru-

¹ *First Nat. Bank v. Marlow*, 71 Mo. 618 (1880); *First Nat. Bank v. Gay*, 63 *Ib.* 33; *Samstag v. Conley*, 64 *Ib.* 476; *Storr v. Wakefield*, 71 *Ib.* 622; *First Nat. Bank v. Gay*, *Ib.* 627.

² *Sweeney v. Thickstun*, 77 Penna. St. 131 (1874).

³ *Cushman v. Welsh*, 19 Ohio St. 536 (1869).

⁴ *Osborn v. Hawley*, 19 Ohio 130 (1850).

⁵ *Zimmerman v. Anderson*, 67 Penna. St. 421 (1871); *Zimmerman v. Rote* 75 *Ib.* 188 (1874).

⁶ *Fort v. Delee*, 22 La. An. 181 (1870).

⁷ *Sweeney v. Thickstun*, 77 Penna. St. 131 (1874).

⁸ *Overton v. Tyler*, 3 Penna. St. 346 (1846).

⁹ *First Nat. Bank v. Marlow*, 71 Mo. 618 (1880).

¹⁰ *Samstag v. Conley*, 64 Mo. 476 (1877).

ment as a bill or note.¹ Thus, if the instrument be for the payment of money and also for the delivery of a horse and a wharf, it is not a note.² Or if it be to pay money and to insure the payee's colts, it is not a note;³ or, to pay a certain sum of money "and all fines according to the rule;"⁴ or, a certain sum "and the demands of the Sick Club;"⁵ or, to pay a certain sum of money "and take up our note given to W. & H. for that amount;"⁶ or to pay money and, on the payee's part, to build a fence.⁷ So, it is said that a promise to pay a certain sum of money "and all other sums that may

¹*Goldman v. Blum*, 58 Tex. 630 (1883). So, a note reciting that it was given for goods purchased which were to remain the property of the payee until the note was paid, *Sloan v. McCarty*, 134 Mass. 245 (1883). But see, *contra*, *Mott v. Havana Nat. Bank*, 22 Hun 354 (1880). So, a contract to pay money with a stipulation as to possession and title of person, property and payment, the attorney's fees has been held not to be a note, *Johnston Harvester Co. v. Clark*, 30 Minn. 308 (1883); or, for attorney's fees "without any relief from valuation or appraisalment laws," *Morgan v. Edwards*, 53 Wis. 599 (1881); or, for attorney's fees and possession of property until note paid, with a provision reserving to the payee the right of declaring the note due at any time when he should deem himself insecure, and the power to take possession of the property in such case, *Deering v. Thom*, 29 Minn. 120 (1884); or, for attorney's fees and right of payee to declare the note due at any time he might deem it insecure, *First Nat. Bank v. Bynum*, 84 N. C. 24 (1881); or, include the power to take the property and sell it when the holder should deem himself insecure, *Smith v. Marland*, 59 Iowa 645 (1882); or, containing an agreement on the payee's part, the maker agreeing to pay in services, *McClellan v. Coffin*, 93 Ind. 456 (1883). So, a note for the payment of a certain sum "and all other debts which A. B. is security for," *Borum v. Reed*, 73 Mo. 461 (1881); or, "with all taxes and charges in the nature thereof that may be laid upon the note or upon the indenture of mortgage accompanying it," *Farquhar v. Fidelity Ins. Co.*, 13 Phila. 473 (1878); or, containing a provision as to the title of certain land and its future disposition, *Killam v. Schoeps*, 26 Kans. 310 (1881); or, extending the time of payment if an agent "does not sell enough in one year," *Miller v. Poage*, 56 Iowa 96 (1881); or, providing for extension unless the maker "can make it convenient, and for other security to be taken in payment when the maker can realize the same in proper shape," *Humphrey v. Beckwith*, 48 Mich. 151 (1882); or, for founding college scholarships which are to be available on the payment of the annual interest, *Ingham v. Dudley*, 60 Iowa 14 (1882).

On the other hand, a collateral agreement not inconsistent with the note has been held not to destroy its negotiability, *Ewing v. Clark*, 76 Mo. 545 (1882). And this has been held of a note given for an insurance policy with a clause avoiding the policy on non-payment of the note, *Pendleton v. Knickerbocker L. I. Co.*, 7 Fed. Rep. 169 (1881).

²*Martin v. Chauntry*, Stra. 1271.

³*Austin v. Burns*, 16 Barb. 643 (1853).

⁴*Ayrey v. Fearnside*, 4 M. & W. 168.

⁵*Bolton v. Dugdale*, 4 B. & Ald. 619 (1833).

⁶*Cook v. Satterlee*, 6 Cow. 108 (1826).

⁷*Fletcher v. Thompson*, 55 N. H. 308 (1875).

be due him," is uncertain in amount and therefore not a note.¹ And the same has been held even of a promise to pay a specified amount "and such sums as may arise as additional premiums on said policy."² But, in England, an instrument providing for the payment of a certain sum of money, "first deducting thereout any interest or money which S. may owe me on any account," was held to be a promissory note under the Statute of Anne.³

Where a note was given in payment for the hire of negroes and contained a provision for clothing them, which was a matter required, and therefore implied, by law, this provision was held, in the Carolinas, to render a note non-negotiable.⁴ But the contrary conclusion was reached as to a similar note in Tennessee.⁵ In Alabama such a note, containing the further provision to return the negro to the payee at the end of the term of hiring, could be declared on as a note;⁶ but this agreement was not assignable with the note.⁷

As to the effect of additional stipulations provided by a contemporaneous writing distinct from the note itself, the reader is referred to the previous section of this chapter. Such an agreement warranting the quality of goods sold has no effect on the negotiability of a note given for the goods.⁸

¹Smith v. Nightingale, 2 Stark. 375 (1818). See, also, *Firbank v. Bell*, 1 B. & Ald. 36.

²Lime Rock Ins. Co. v. Hewett, 60 Me. 407 (1872).

³Barlow v. Broadhurst, 4 Moore 471 (1820).

⁴Wallace v. Dyson, 1 Speers 127 (1842); *Knight v. Wilmington R. R.*, 1 Jones 357 (1854); *Barnes v. Gorman*, 9 Rich. 297 (1856).

⁵Baxter v. Stewart, 4 Sneed 213 (Tenn. 1856).

⁶Gaines v. Shelton, 47 Ala. 413 (1872).

⁷Winston v. Metcalf, 7 Ala. 837 (1845). And such provision in a sealed covenant has been held to destroy its assignability, *Boyd v. Rumsey*, 5 J. J. Marsh. 42 (1830).

⁸Cook v. Weirman, 51 Iowa 561 (1879).

CHAPTER VII.

FORM—COMPLETION OF CONTRACT—INLAND
BILLS.*I. Stamps.**II. Delivery.**III. Inland and Foreign Bills.**IV. Parts or Sets of Parts.*

I. STAMPS.

209. English and American Stamp Acts.

210. Constructions of U. S. Statutes.

211. When Stamp may be Affixed—Presumptions.

212. Cancellation—Fraudulent Omission.

213. Clause Avoiding for Want of Stamp Unconstitutional.

214. Admissibility in Evidence—Pleading.

215. Action on Original Consideration.

§ 209. **English and American Stamp Acts.**—Almost all countries require by statute certain stamps upon bills of exchange and notes. No courts, however, charge themselves with the enforcement of foreign stamp laws. This is the rule, at least, in England and in the United States.¹ It is also the rule of practice in State courts as to stamp laws of other States of the Union, if any.²

The English stamp acts now in force apply to bills of exchange, promissory notes and checks, and the amount of stamp required depends in general upon the amount for which the instrument is made.³

¹Edwards on Stamp Act 14; *Holman v. Johnson*, Cowp. 143; *James v. Catherwood*, 3 D. & R. 190; *Ludlow v. Van Rensselaer*, 1 Johns. 94 (1806). "As we do not sit here," said Livingston, J., in the latter case, "to enforce the revenue laws of other countries, it is perfectly immaterial in a suit before us, whether or not the note was stamped according to the laws of France."

²*Fant v. Miller*, 17 Gratt. 47 (1866), as to Maryland Stamp Act. This act rendered the unstamped paper inadmissible in evidence but not void.

³Prior to October 11th, 1854, the stamp required by the English Statute (55 Geo. III. c. 184) for bills and notes, varied in amount according to the length of time the paper had to run. This was changed by Act of 17 and 18 Vict. c. 83, and the amount of stamp is now regulated, as it was by the

The first stamp act in the United States was passed in July, 1797, and required a stamp of ten cents upon promissory notes between twenty dollars and one hundred dollars, unless they were made payable within sixty days. Without such stamp they were not admissible in evidence. This act was held in the State of New York to apply to its Supreme Court.¹ It was repealed in 1802; and from that time until

U. S. Int. Rev. Act, by the amount for which the bill or note is drawn. By the Act of 1870 (33 and 34 Vict. c. 97) all bills of exchange and promissory notes, other than bank notes, "drawn or expressed to be payable, or actually paid or indorsed, or in any manner negotiated in the United Kingdom," are subjected to a stamp duty by the following schedule:

Payable on demand,	. . . . .	1d.
Under £5,	. . . . .	1d.
Exceeds £5 and does not exceed £10,	. . . . .	2d.
" 10 " " 25,	. . . . .	3d.
" 25 " " 50,	. . . . .	6d.
" 50 " " 75,	. . . . .	9d.
" 75 " " 100,	. . . . .	1s.
Every £100 or fraction thereof,	. . . . .	1s.

Under bills of exchange are included by the act drafts, orders, checks and letters of credit, as well as orders for payment in installments or out of a particular fund (§ 48), but only one of a set need be stamped (§ 55). Under promissory notes is included any document or writing for the payment of money (§ 49), even though made payable out of a particular fund or on a contingency. By the Act of 1871 (34 and 35 Vict. c. 74) demand notes, referred to in the schedule to the Act of 1870, are made to include all bills of exchange and promissory notes payable at sight or on presentation. The Act of 1870 exempts from stamp duty Bank of England bills or notes, bankers' drafts issued solely for purpose of clearing accounts between bankers in the United Kingdom, letters by bankers in the United Kingdom directing payment of money, not to bearer or order and not sent to the payee or any one on his behalf, letters of credit authorizing drafts to be drawn out of the United Kingdom payable in it, interest coupons attached to and issued with the security, and certain official drafts, orders and warrants. By the Act of 17 and 18 Vict. c. 83 rates were imposed according to the following classification: 1. Inland bills of exchange, drafts or orders for the payment to the bearer or to order, at any time otherwise than on demand, of any sum of money. 2. Promissory notes for the payment in any other manner than to the bearer on demand of any sum of money not exceeding £100. 3. Promissory notes for the payment either to the bearer on demand, or in any other manner than to the bearer on demand, of any sum of money exceeding £100 (Jacob's Fishers' Dig. Vol. I. p. 1107). The Act of 48 Geo. III. c. 149 and 55 Geo. III. c. 184 also contained provisions including bills, drafts or orders payable out of a particular fund. A post-dated check, not included in the statutory enumeration, has been held to be admissible in evidence with a penny stamp, *Bull v. O'Sullivan*, L. R. 6 Q. B. 209 (1871). A bill drawn in the Isle of Man prior to 1870 and not presented or negotiated in the United Kingdom, has been held to be a foreign bill and as such not within the Stamp Act of 17 and 18 Vict., *Griffin v. Weatherby*, L. R. 3 Q. B. 753 (1868). The amounts above designated need not take accruing interest into account, *Israel v. Benjamin*, 3 Campb. 41.

¹*Edeck v. Ranuer*, 2 Johns. 423 (1807). This case assumed rather than decided the applicability of the statute to the State court.

the first of July, 1862, there was no stamp required upon commercial paper by any act of Congress.

On the first of July, 1862, an act was passed, requiring all bank checks, drafts or orders above twenty dollars, inland bills of exchange, drafts and notes, excepting bank notes, over twenty dollars, and foreign bills of exchange or letters of credit, to be stamped. The stamp upon bank checks, drafts or orders over twenty dollars was two cents; upon inland bills of exchange, drafts and notes over twenty dollars, from five cents, upward, varying according to the amount of money to be paid; and on foreign bills and letters of credit, in sets of three, on each set three cents and upward, varying according to the amount of the bill or letter.¹ By section 95 of this act, a penalty was incurred by the omission of the stamp, and it was further provided that the instrument, if not stamped, "shall be deemed invalid and of no effect." This provision was, from time to time, extended, so as not to apply to commercial paper made before June 1st, 1863. By the Act of December 25th, 1862, provision was also made for stamping such instruments in open court, and by Act of March 3d, 1863,² it was provided that such instruments should not be admitted or used in evidence until they were properly stamped.

The United States Stamp Acts provided that no instrument wanting the requisite stamp should "be admitted or used in evidence in any court until a legal stamp, denoting the amount of tax, was affixed thereto, as prescribed by law," and this was enforced by a penalty. And it was further provided that the unstamped instrument should "be deemed invalid and of no effect;" with the provision, however, for having such instrument stamped by the United States collector of the district.³ They also provided that such revenue stamp should be canceled by the initials of the party, with

¹U. S. Stats. 1862 c. 119.

²U. S. Stats. 1863 c. 74 § 16.

³U. S. Rev. Stats. Ed. 1878, §§ 3421, 3422.

the date, or in such other way as might be prescribed by the Commissioner of Internal Revenue.¹

All of these provisions were repealed by the Act of October 1st, 1872, except as to checks. A revenue stamp of two cents was still required upon every "bank check, draft, order or voucher for the payment of money drawn upon any bank, banker or trust company, at sight or on demand," until May 15th, 1883.² This provision did not include official drafts or vouchers of federal or municipal governments.³

At present there is no law in the United States requiring stamps upon any kind of commercial paper.

§ 210. **Constructions of U. S. Statutes.**—There have been numerous cases before the federal and state courts in America, construing the stamp acts since 1862. It has been held that a United States revenue stamp was in no case necessary on an instrument executed before October, 1862.⁴ But the stamp act of 1870 was held to apply to a note already made at that time.⁵ The United States stamp acts did not apply to a bill or note made during the war within the lines of the Confederate States.⁶ And this was held to be the case in Texas even as late as January, 1865.⁷

The indorsement of a note or bill did not, under these statutes, require a stamp.⁸ Nor did the certification of a check.⁹ And a due-bill reading, "Due A. B. on corn, five hundred and twenty-five dollars (\$525)," has been held not to require a stamp.¹⁰ This is true, too, of a mere admission of a balance

¹ U. S. Rev. Stats., Ed. 1878, §§ 3423, 3424.

² U. S. Rev. Stats., Ed. 1878, § 3418. In 1883 the act which still required stamps on checks was repealed, to take effect on May 15th, 1883, U. S. Laws 1883 c. 121.

³ U. S. Rev. Stats., Ed. 1878, § 3420.

⁴ *Bayly v. McKnight*, 19 La. An. 321 (1867).

⁵ *Pugh v. McCormick*, 14 Wall. 361 (1871). But as to the Acts of 1864 and 1865, see *Garland v. Lane*, 46 N. H. 245 (1865); *Whigham v. Pickett*, 43 Ala. 140 (1869).

⁶ *Susong v. Williams*, 1 Heisk. 625 (1870); *McElvain v. Mudd*, 44 Ala. 48 (1870).

⁷ *Van Alstyne v. Sorley*, 32 Tex. 518 (1870).

⁸ *Pugh v. McCormick*, 14 Wall. 361 (1871).

⁹ *Merchants' Bank v. State Bank*, 10 Wall. 604 (1870).

¹⁰ *Jacquin v. Warren*, 40 Ill. 459 (1866).

due on an account, which, as has been already seen, is not equivalent to a promissory note.¹ Again, where a note was altered by changing its date, it was held not to need a new stamp on that account, as a new note.² And where a contemporaneous note and agreement are made to operate as one instrument, the stamp on the note alone has been held sufficient.³ A revenue stamp was necessary to a small draft by the agent or treasurer of a corporation for wages, but such draft might be stamped as a check and not as a note.⁴

It was not, however, necessary upon a bond required by law in insolvency cases, this not being a voluntary instrument.⁵ Where a note, originally stamped according to law, had been barred by the discharge of the maker as an insolvent, his subsequent promise, by an unstamped letter, to pay the note, was held to be sufficient; this not being a new contract, but merely evidence of the original promise.⁶ Under the Scaling Acts in the Southern States, a note made for a large amount in confederate currency, but valued at much less and stamped as a note for a smaller amount, was admissible in evidence, the jury being left to estimate the value of the note.⁷

§ 211. **When Stamp may be Affixed—Presumptions.**—Where an instrument appears properly stamped, it is a presumption of law that the stamp was affixed at the time of its delivery.⁸ So, it is presumed, in the absence of proof to the contrary, in an action upon a lost bill of exchange, that it was properly stamped; especially if the bill be detained in the defendant's possession after notice given to produce it.⁹

¹ *Jones v. Jones*, 38 Cal. 584 (1869).

² *Prather v. Zulauf*, 38 Ind. 155 (1871).

³ *Bowker v. Goodwin*, 7 Nev. 135 (1871).

⁴ *United States v. Isham*, 17 Wall. 496 (1873).

⁵ *McGovern v. Hoesback*, 53 Penna. St. 177 (1866).

⁶ *Cook v. Shearman*, 103 Mass. 21 (1869).

⁷ *Kill v. Johnson*, 48 Ga. 189 (1873).

⁸ *Union Agric. Assoc. v. Neill*, 31 Iowa 95 (1870); *Iowa, &c., R. R. v. Perkins*, 28 *Ib.* 281 (1869); or, at the time of its transfer, if that is what the law requires, *Bradlaugh v. DeRin*, L. R. 3 C. P. 286 (1868); and by the proper person, *Iowa, &c., R. R. v. Perkins*, *supra*.

⁹ *Marine Ins. Co. v. Haviside*, L. R. 5 H. L. 625.

Where, however, a note was stamped by the holder after its delivery, it was still valid in the absence of fraudulent intent.¹ And if left unstamped through the maker's ignorance and afterwards stamped by the payee, the maker could not object to such stamping;² even though he had been requested to cancel such stamp and had refused.³ Indeed, a bill or note may be stamped after issue joined in a suit upon it, and this will constitute no defense against a *bona fide* holder for value.⁴ And if a note was stamped after its delivery without authority of the maker, it was still valid at suit of a *bona fide* holder.⁵ And this is so in the hands of a *bona fide* holder for value, even where the note had been delivered without a stamp, under an agreement that it should not be used until stamped by the maker, and had, notwithstanding this agreement, been fraudulently stamped and negotiated by the payee.⁶ Where, however, it is not in the hands of a *bona fide* holder for value, notice to the holder of the original want of stamp and of the absence of authority from the maker to affix the stamp, will constitute a good defense.⁷ Whether a stamp has been used in fraud of the United States Revenue a second time, is a question of fact for the jury.⁸

As has been already remarked, a note left unstamped might be stamped in open court at the time of trial, if the original omission was without fraud.⁹ This is true also where the omission was designed but without fraud, the note having been given merely as a memorandum.¹⁰ The act of June

¹Willey v. Robinson, 13 Allen 128 (1866).

²Green v. Lowry, 38 Ga. 548 (1868).

³Day v. Baker, 36 Mo. 125 (1865).

⁴Blackwell v. Denie, 23 Iowa 63; Robinson v. Lair, 31 Iowa 9 (1870); Sperry v. Horr, 32 *Ib.* 184 (1871). And the want of a stamp will not affect the *bona fides* of the holder, Burson v. Huntington, 21 Mich. 415 (1870).

⁵Blackwell v. Denie, 23 Iowa 63 (1867); Latham v. Smith, 45 Ill. 25 (1867).

⁶Anderson v. Starkweather, 28 Iowa 409 (1869).

⁷First Nat. Bank v. Dougherty, 29 Iowa 260 (1870).

⁸Rockwell v. Hunt, 40 Conn. 328 (1873).

⁹Morris v. Morris, 44 Miss. 441 (1870); Waterbury v. McMillan, 46 Miss. 635 (1872).

¹⁰Redlich v. Doll, 54 N. Y. 234 (1873).

30th, 1864, providing for stamping in court, was held to be applicable, and the act of March 3d, 1865, requiring a stamp to be affixed by the collector, was held to be inapplicable, to a note made in 1863.¹ It has been held, however, that a note made after June 30th, 1864, could not be stamped in open court.² When an instrument has been thus stamped, it is thereby rendered valid from its date.³ And such stamping under the statute by an attorney in court has been held sufficient without any cancellation of the stamp.⁴ So, if a stamp has been affixed by the United States collector, it renders the instrument valid, as if it had been originally duly stamped.⁵ And such stamping by the collector is not an alteration, and cures the defect arising from a want of stamp, although the omission may have been originally with design to defraud the government.⁶

§ 212. **Cancellation—Fraudulent Omission.**—The cancellation of a stamp has been held sufficient, where it was merely so defaced as to be incapable of further use.⁷ And a cancellation by the initials of one only of several joint makers has been held sufficient.⁸ Whether a cancellation of a stamp by the maker's initials was authorized by him is a question for the jury.⁹ It has also been held to be a sufficient cancellation, if the payee's initials are used instead of the maker's.¹⁰ And if stamped in court and the stamp canceled

¹Garland v. Lane, 46 N. H. 245 (1865).

²Whigham v. Pickett, 43 Ala. 140 (1869). But in Tobey v. Chipman, 13 Allen 123 (1866), it was held to apply to a note dated August 1st, 1864, so as to cure the defect of an omission of stamp made without fraud. See, too, U. S. Stats. 1866 c. 184.

³Dorris v. Grace, 24 Ark. 326 (1866).

⁴Blunt v. Bates, 40 Ala. 470 (1867). As to whether the attorney of the payee can be obliged to testify whether the note was stamped before delivery, see Wheatley v. Williams, 1 M. & W. 533.

⁵Aldrich v. Hagan, 50 N. H. 60 (1870); Gibson v. Hibbard, 13 Mich. 214 (1865); Long v. Spencer, 78 Penna. St. 303 (1875).

⁶Crews v. Farmers' Bank, 31 Gratt. 348 (1879).

⁷Taylor v. Duncan, 33 Tex. 440 (1870).

⁸Spear v. Alexander, 42 Ala. 572 (1868).

⁹Rees v. Jackson, 64 Penna. St. 486 (1870).

¹⁰Schultz v. Herndon, 32 Tex. 390 (1869).

without any initials, this has been held sufficient.¹ Indeed, if the cancellation of a stamp has been omitted altogether, this omission furnishes no defense on the maker's part, as such omission could only be the maker's own wrong.²

Fraud is never to be presumed in case of the omission of a stamp, but must be clearly proved.³ Indeed, it has been held that in case of such omission, there is a presumption of good faith on the maker's part.⁴ Although the omission has been said to be *prima facie* intentional.⁵ It is only fraudulent omissions that render an instrument void or inadmissible in evidence.

§ 213. **Clause Avoiding for Want of Stamp Unconstitutional.**—The United States Revenue Act has been held to be unconstitutional so far as it rendered a bill of exchange void for want of a stamp;⁶ and so far as it rendered an unstamped deed void.⁷

But, as has been said, the omission of a stamp did not render the instrument void under the act of Congress, unless it was fraudulent in its purpose.⁸ This is true both as to the clause avoiding the instrument and as to the penal clause.⁹

¹ *Foster v. Holley*, 49 Ala. 593 (1873).

² *Mogelin v. Westhoff*, 33 Tex. 788 (1871); *Desmond v. Norris*, 10 Allen 250 (1865); nor does it affect its admissibility in evidence, *Jacobs v. Cunningham*, 32 Tex. 774 (1870); *Schultz v. Herndon*, *Ib.* 390 (1869).

³ *Moore v. Quick*, 105 Mass. 49 (1870); *Craig v. Dimock*, 47 Ill. 308 (1868); *Morris v. Morris*, 44 Miss. 441 (1870); *Waterbury v. McMillan*, 46 Miss. 635 (1872).

⁴ *Baker v. Baker*, 6 Lans. 509 (1872); *Grant v. Conn. Mut. Ins. Co.*, 29 Wisc. 125 (1877); *New Haven Co. v. Quintard*, 6 Abb. Pr. (N. S.) 128 (1869); *Ricord v. Jones*, 33 Iowa 26 (1871); *Weltner v. Riggs*, 3 W. Va. 445 (1869).

⁵ *Howe v. Carpenter*, 53 Barb. 382 (1869).

⁶ *Hunter v. Cobb*, 1 Bush 239 (1866); *Craig v. Dimock*, 47 Ill. 308 (1868); *Burson v. Huntington*, 21 Mich. 415 (1870).

⁷ *Moore v. Moore*, 47 N. Y. 467 (1872).

⁸ *Dudley v. Wills*, 55 Me. 145 (1867); *Cabbott v. Radford*, 17 Minn. 320 (1871); *Whigham v. Pickett*, 43 Ala. 140 (1869); *State v. Hill*, 30 Wisc. 416 (1872); *Atkins v. Plympton*, 44 Vt. 21 (1871); even, it seems, though it was intentional, *Patterson v. Gile*, 1 Col. 200 (1870). Indeed, an omission without fraud affects neither the validity of an instrument nor its admissibility in evidence, *Bowen v. Byrne*, 55 Ill. 467 (1870); *Craig v. Dimock*, 47 *Ib.* 308 (1868); *Bunker v. Green*, 48 *Ib.* 243 (1868); *Hanford v. Obrecht*, 49 *Ib.* 146; *Maynard v. Johnson*, 2 Nev. 16 (1866).

⁹ *Green v. Holway*, 101 Mass. 243 (1869); *Baker v. Baker*, 6 Lans. 509 (1872); *Frink v. Thompson*, 4 *Ib.* 486 (1869); *Works v. Hershey*, 35 Iowa

It is plain, therefore, that the omission of a stamp by the maker's agent and against his direction, inadvertently, would have no effect to avoid the instrument.¹ It has been held that an omission of a stamp invalidates the instrument, even without fraudulent intent.² This is not supported, however, by the weight of authority.

On an indictment for forgery, the fact that the instrument was not stamped has been held to constitute no defense in England.³ The same principle appears to have been held in the United States, an indictment for such forgery being there held sufficient without any allegation that the instrument was stamped. This conclusion seems to have been derived from the rule that the unstamped instrument would be void only by reason of a fraudulent omission of the stamp.⁴ The contrary was held, however, in Texas, on the ground that the crime of forgery could not be complete until the instrument was stamped.⁵

§ 214. **Admissibility in Evidence—Pleading.**—Where there has been no fraud in the omission of the stamp, the instrument has been held to be admissible in evidence without it.⁶ Likewise, on proof of omission by mistake;⁷ or even without any such proof, unless fraud was affirmatively shown.⁸ It has been held, on the other hand, that an unstamped note

340 (1872); *Ricord v. Jones*, 33 *Ib.* 26 (1871); *Weltner v. Riggs*, 3 W. Va. 445 (1869). This is true also as to other contracts, *Vorebeck v. Roe*, 50 Barb. 302 (1867); *Morgan v. Graham*, 35 Iowa 213 (1872); *Mitchell v. Home Ins.*, 32 *Ib.* 421.

¹ *Vaughan v. O'Brien*, 57 Barb. 491 (1870).

² *Hugus v. Strickler*, 19 Iowa 414 (1865). This was not the case of a bill or note. See, too, *Wayman v. Torreyson*, 4 Nev. 124 (1868), where the administrator of the maker was not allowed after the maker's death to affix a stamp.

³ *Rex v. Hawkswood*, 3 East P. C. 955; *Rex v. Teague*, 2 *Ib.* 79.

⁴ *State v. Hill*, 30 Wisc. 146 (1872). This case overrules *John v. State*, 23 *Ib.* 504 (1868).

⁵ *Horton v. State*, 32 Tex. 79 (1869).

⁶ *Oxford Iron Co. v. Spradley*, 51 Ala. 171 (1874); *Perryman v. Greenville*, *Ib.* 507; *Emery v. Hobson*, 63 Me. 33 (1873); *Black v. Woodrow*, 39 Md. 194 (1873); *Bowen v. Byrne*, 55 Ill. 467 (1870); *Craig v. Dimock*, 47 *Ib.* 308 (1868); *Bunker v. Green*, 48 *Ib.* 243 (1868).

⁷ *Beebe v. Hutton*, 47 Barb. 187 (1866).

⁸ *Timp v. Dockham*, 29 Wisc. 440 (1872).

could not be admitted in evidence, even in a State court, until it was properly stamped;¹ and that the contents of an unstamped agreement, which has been lost, could not be proved at all.²

But it seems unnecessary to set out the stamp or the fact that the instrument was stamped in the pleadings, and the failure to make this appear in a declaration is not ground for demurrer;³ even though the declaration purport to set forth a copy of the note and make no mention of a stamp upon it.⁴ So, the mere omission of a stamp cannot be pleaded in defense, unless the plea also show that the instrument cannot be made good by stamping it before trial.⁵ The stamp is no part of a bill or note, and need not appear in the case after verdict rendered.⁶ And the omission of a stamp, in like manner, on appeal papers is immaterial, except in case of fraud.⁷

The want of a stamp has been held to render the unstamped instrument inadmissible in evidence, even in a State court,⁸ until it has been properly stamped by the collector.⁹ On the other hand, the act of Congress has been generally held, so far as relates to evidence, to apply only to the United States courts.¹⁰ And so far as it required a stamp upon the

¹ *Plessinger v. Dupuy*, 25 Ind. 419 (1865).

² *Turner v. State*, 48 Ala. 549 (1872).

³ *Cabbott v. Radford*, 17 Minn. 320 (1871).

⁴ *Trull v. Moulton*, 12 Allen 396 (1866); *Campbell v. Wilcox*, 10 Wall. 421 (1870).

⁵ *Byles* 119; *Bradley v. Bardsley*, 15 L. J. Ex. 115; 3 D. & L. 476; 14 M. & W. 873. See, however, *Lazarus v. Cowie*, 3 Q. B. 465; *Tattersall v. Fearnly*, 17 C. B. 368.

⁶ *Owsley v. Greenwood*, 18 Minn. 429 (1872).

⁷ *Harper v. Clark*, 17 Ohio St. 190 (1867).

⁸ *Chartiers Turnpike v. McNamara*, 72 Penna. St. 281 (1873); *Tripp v. Bishop*, 56 Penna. St. 424 (1868); *Jones' Appeal*, 62 *Ib.* 324 (1869); *City of Muscatine v. Sterneman*, 30 Iowa 526 (1870); *Musselman v. Mank*, 18 *Ib.* 239; *Botkins v. Spurgeon*, 20 *Ib.* 598; *Doud v. Wright*, 22 *Ib.* 337; *Cedar Rapids R. R. v. Stewart*, 25 *Ib.* 117; *McLearn v. Skelton*, 18 La. An. 514 (1866).

⁹ *Corrie v. Estate of Billier*, 23 La. An. 250 (1871).

¹⁰ *Carpenter v. Snelling*, 97 Mass. 452 (1867); *Lynch v. Morse*, *Ib.* 458; *People v. Gates*, 43 N. Y. 40 (1870); *Griffin v. Ranney*, 35 Conn. 239 (1868); *Green v. Holway*, 101 Mass. 243 (1869); *Sporrer v. Eifler*, 1 Heisk. 633 (1870); *Bowen v. Byrne*, 55 Ill. 467 (1870); *Rockwell v. Hunt*, 40 Conn. 328 (1873);

process of a State court, it was held at an early day to be unconstitutional.¹

§ 215. **Action on Original Consideration—How Affected.**—Where the omission of a stamp is set up in defense by the maker at suit of the payee of a note, recovery may be had on the original consideration.² And in an action on the original consideration, an unstamped note given for it, is admissible in evidence for the purpose of showing the date of the transaction at least.³ It is also to be observed that the want of a stamp upon an instrument at the time of its delivery furnishes no evidence to rebut the presumption that the transfer to the holder was for valuable consideration.⁴

It has been held in England that an instrument may be admitted in evidence without a stamp for collateral purposes, such as to negative an allegation of payment;⁵ or to refresh the memory of a witness;⁶ or to corroborate a witness;⁷ or to prove fraud;⁸ or usury;⁹ or to prove an agreement illegal;¹⁰ or to show that a former agreement has been rescinded.¹¹ But it is not admissible in order to show the payee's assent to the cancellation of an original acceptance;¹²

Sammons v. Halloway, 21 Mich. 162 (1870); *Burson v. Huntington*, *Id.* 415; *Weltner v. Riggs*, 3 W. Va. 445 (1869); *Forcheimer v. Holly*, 14 Fla. 239 (1872). So, too, in other contracts, *United States Exp. Co. v. Haines*, 48 Ill. 248 (1868); *Clemens v. Conrad*, 19 Mich. 170 (1869); *Davis v. Richardson*, 45 Miss. 499 (1871).

¹ *Warren v. Paul*, 22 Ind. 276 (1864); *Fifield v. Close*, 15 Mich. 505 (1867).

² *Wilson v. Carey*, 40 Vt. 179 (1868); *Humphreys v. Wilson*, 43 Miss. 328 (1870).

³ *Israel v. Redding*, 40 Ill. 362 (1866).

⁴ *Long v. Spencer*, 78 Penna. St. 303 (1875).

⁵ *Smart v. Nokes*, 6 Man. & G. 911.

⁶ *Maugham v. Hubbard*, 8 B. & C. 14.

⁷ *Dover v. Maestaer*, 5 Esp. 92.

⁸ *Byles* 117; *Gregory v. Fraser*, 3 Campb. 454. See, too, *Holmes v. Sixsmith*, 7 Exch. 802; *Watson v. Poulson*, 15 Jur. 1111; *Keable v. Payne*, 8 Ad. & El. 555; *Reg. v. Gompertz*, 9 Q. B. 824.

⁹ *Nash v. Duncomb*, 1 M. & Rob. 184.

¹⁰ *Coppock v. Bower*, 4 M. & W. 361.

¹¹ *Reed v. Deere*, 7 B. & C. 261; and see *Swears v. Wills*, 1 Esp. 317.

¹² *Sweeting v. Halse*, 9 B. & C. 365; 4 M. & R. 287.

or to take a promise out of the Statute of Limitations;¹ or to prove an admission of a party to the suit.²

The American decisions above referred to have now no application to commercial instruments drawn in, or governed by, the laws of the United States. For a fuller statement of the English cases interpreting the English Stamp Acts the reader is referred to the learned and exhaustive chapter of Mr. Justice Byles on this subject.³

¹ *Jones v. Ryder*, 4 M. & W. 32; and see *Holmes v. MacKrell*, 3 C. B. (N. S.) 789.

² Byles 117; or as a payment, *Wilson v. Vysar*, 4 Taunt. 288; *Jardine v. Payne*, 1 B. & Ad. 663; and where payment was made by an unstamped bill, the indorser was held not to be entitled to formal notice of its subsequent dishonor, *Cundy v. Marriott*, 1 B. & Ad. 696.

³ Byles 104 *et seq.*

II. DELIVERY.

- 216. Necessity for Delivery.
- 217. Pleading—Evidence—Presumptions.
- 218. Delivery—By Mail—In Sealed Envelope.
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- 224. Instrument Takes Effect From.
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- 227. On Condition—In Escrow.
- 230. Want of—As a Defense.
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§ 216. **Delivery Necessary.**—Commercial paper, like other written contracts, takes effect and is completed only by delivery.¹ This is true, not only of the principal contract on the face of the note or bill, but also of the indorsement.² Thus, a note may be indorsed by the payee without effecting a transfer so long as it remains in his hands.³ And the indorsement should be made to the indorsee as such.⁴ Mere signature by a stranger as indorser in the payee's presence

¹ Daniel 73; 1 Parsons 48; *Brind v. Hampshire*, 1 M. & W. 365 (1836); *Marston v. Allen*, 8 *Ib.* 494 (1841); *Lansing v. Gaine*, 2 Johns. 300 (1807); *Marvin v. McCullum*, 20 *Ib.* 288 (1822); *Powell v. Waters*, 8 Cow. 687 (1826); *Howe v. Ould*, 28 Gratt. 1 (1876); *Carter v. McClintock*, 29 Mo. 464 (1860); *Lawrence v. Bassett*, 5 Allen 141 (1862); *Curtis v. Gorman*, 19 Ill. 141 (1857); *Thomas v. Watkins*, 16 Wis. 549 (1863); *Chamberlain v. Hopps*, 8 Vt. 94 (1836); *Prather v. Zulauf*, 38 Ind. 155 (1871); *Jones v. Deyer*, 16 Ala. 221 (1849).

² *Lysaght v. Bryant*, 9 C. B. 46 (1850); *Adams v. Jones*, 12 Ad. & El. 455 (1840); *King v. Lambton*, 5 Price 428 (1818); *Clark v. Boyd*, 2 Ohio 56 (1825); *Brind v. Hampshire*, *supra*; *Ex parte Cote*, L. R. 9 Ch. App. 27 (1873); *Dana v. Norris*, 24 Conn. 333 (1856); *Richards v. Darst*, 51 Ill. 140 (1869); *Mott v. Wright*, 4 Biss. C. C. 53 (1865); *May v. Cassiday*, 7 Ark. 376 (1847).

³ *Mendenhall v. Baylies*, 47 Ind. 575 (1874); *Wulschner v. Sells*, 87 *Ib.* 71 (1882). And if a note is made payable to A. for a debt due to her father, B., and at his request, and is taken by her without his knowledge from his private papers, there is no valid transfer or delivery to A., although her father's indorsement might not have been necessary to a note drawn in such form, *Hatton v. Jones*, 78 Ind. 466 (1881). So, too, *Fanning v. Russell*, 94 Ill. 386 (1880), where a note of like tenor was taken from the father's papers after his death; and *Foglesang v. Wickard*, 75 Ind. 258 (1881), where the note was made payable to the father and indorsed by him with the intention of a gift, but never completed by delivery, and it was taken by the daughter after his death from his papers.

⁴ *Adams v. Jones*, 12 Ad. & El. 455 (1840); *Brind v. Hampshire*, 1 M. & W. 365 (1836); *Marston v. Allen*, 8 M. & W. 494 (1841).

after the note is executed and delivered to the payee, does not, of itself, amount to a redelivery, and involves no liability on the indorser's part without a fresh consideration.¹

It is likewise true that delivery is necessary to the complete acceptance of a bill, and an acceptance written upon a bill may be canceled before its delivery and remain of no effect.² So, writing an acceptance on an incomplete bill is of no effect until the bill is completed and delivered.³ It is said, however, that an acceptance may take effect without delivery if the acceptor detains the bill in his possession for an unreasonable length of time.⁴ And this is sometimes provided by statute.⁵ But the certification of a check by a bank only takes effect when the certified check is redelivered to the holder, and if it is so delivered after notice to the bank of defense on the drawer's part, and the bank subsequently pays, it will do so at its own peril.⁶

§ 217. **Delivery—Pleading—Evidence.**—Delivery need not be specially averred in the declaration upon a note or bill. The word "promised" or "made" sufficiently implies delivery in pleading.⁷

Delivery is in general presumed from possession of the bill or note.⁸ And even where a note originally payable to "A. or bearer," is in the possession of C. indorsed by B.,

¹Williams v. Williams, 67 Mo. 661 (1878).

²Cox v. Troy, 1 D. & R. 38 (1822); S. C., 5 B. & Ald. 474, overruling Thornton v. Dick, 4 Esp. 270 (1803). See, to like effect, Bank of Van Dieman's Land v. Victoria Bank, L. R. 3 P. C. 526 (1871). But in Smith v. McClure, 5 East 477, the acceptance of a bill was held to be perfect without redelivery by the acceptor to the payee. And see Story on Bills § 203 n.; Chitty 198. But an acceptance written on an order but never delivered, is no payment of the debt for which the order was drawn, Dunavan v. Flynn, 118 Mass. 537 (1875).

³Ex parte Hayward, L. R. 6 Ch. App. 546 (1871).

⁴Smith v. McClure, 5 East 477.

⁵See Chapter on Acceptance.

⁶Freund v. Imp. and Traders' Nat. Bank, 3 Hun 689 (1875).

⁷Churchill v. Gardner, 7 T. R. 596; Binney v. Plumley, 5 Vt. 500 (1833). So, the allegation that defendant "indorsed" implies delivery, Chester, &c., R. R. Co. v. Lickiss, 72 Ill. 521 (1874). So, the word "executed," Nicholson v. Combs, 90 Ind. 515 (1883).

⁸1 Daniel 76; 1 Parsons 50; Woodford v. Dorwin, 3 Vt. 82 (1830); Kidder v. Horrobin, 72 N. Y. 159 (1878). On proof of the maker's handwriting, Pate v. Brown, 85 N. C. 166 (1881). But see Lloyd v. Sandilands, Gow. C. N. P. 15, where possession of a check by the payee was held not to be evidence of its delivery to him by the maker.

delivery to B. will be presumed from C.'s possession.¹ So, where a note was found among the papers of a deceased payee, its proper delivery is to be presumed.² But if found among papers of a deceased person who is a stranger to it and whose representatives make no claim to it, no delivery to the payee will be presumed, and delivery actual or constructive must be shown.³

Where a note or bill is so drawn or indorsed as to be payable to bearer and transferable by delivery, the want of delivery will constitute no defense to the paper in the hands of a *bona fide* holder.⁴ So, where a check, indorsed in blank by the payee, is canceled by tearing into two pieces, and is afterwards put together and transferred to a *bona fide* holder, the want of proper delivery will constitute no defense.⁵ But where a bill was indorsed without delivery and issued in fraud of the indorser, he may show in his defense that the plaintiff was not a *bona fide* holder.⁶

§ 218. **Delivery by Mail—In Sealed Envelope—Contents Unknown.**—It is not necessary to a good delivery that it should be actually handed by one person to another. It is a sufficient delivery if the paper be mailed to the payee's address.⁷ In France commercial paper mailed in this way

¹Cox v. Adams, 2 Ga. 158 (1847).

²Holliday v. Lewis, 14 Hun 478 (1878). But a note payable "to A., if she called for it before she deceased; if not, to be paid to B. by her order," has been held to be B.'s property and recoverable as such from A.'s executor, although found among A.'s papers at her death, *Blanchard v. Sheldon*, 43 Vt. 512 (1871).

³Mahon v. Sawyer, 18 Ind. 73 (1862). So, a note intended for a gift, and found among waste papers of the maker after her death, is not presumed to have been delivered, *Blanchard v. Williamson*, 70 Ill. 647 (1873).

⁴Kinyon v. Wohlford, 17 Minn. 239 (1871).

⁵Ingham v. Primrose, 7 C. B. (s. s.) 82 (1859). But in *Scholey v. Ramsbottom*, 2 Campb. 485, a check torn into four pieces, afterward pasted together and much soiled, was held to carry notice on its face sufficient to put a purchaser upon inquiry, and the bank paying the check without inquiry was held liable for the amount.

⁶Marston v. Allen, 8 M. & W. 494 (1841). So far as this case appears, in the opinion of Alderson, B., to decide that such defense cannot be set up against a *bona fide* holder it is disapproved as a mere *dictum* in *Burson v. Huntington*, 21 Mich. 415 (1870).

⁷Sichel v. Borch, 2 H. & C. 956 (1864); *Kirkman v. Bank of America*, 2 Coldw. 397 (1865); *Mitchell v. Byrne*, 6 Rich. 171 (1853). Or, by mail, to a husband for his wife, *Funk v. Lawson*, 12 Bradw. 229 (1882).

is revocable until actually sent off by the post office, and there is therefore no delivery until that occurs.¹ Giving a note to the maker's agent, *e. g.* to the purser of a Havana steamer, addressed to the payee in New York, to be mailed by the purser on the arrival of the steamer in New York, is not a delivery.² Nor is it a sufficient delivery to place a package of bills and notes so addressed in the hands of a servant to be delivered to the postman next morning.³ On the question as to what local law governed a note, it was held in England that a note *payable at Norwich* and mailed to the payee, addressed to that place, was delivered there, and not where it was mailed.⁴ But a bill of exchange, signed and indorsed in Ireland in blank and transmitted in that form to England, was held to be an Irish contract not requiring an English stamp.⁵ On the other hand, an acceptance signed in L. and sent by messenger to the payee in E., was held to have been delivered in E., the messenger in this case being plainly the acceptor's agent.⁶ But if a note is drawn in Ohio for an insurance policy to be issued in New York, and the note is sent to New York and the policy issued there, it will be considered a New York note delivered there and not in Ohio.⁷

Merely leaving a note on the payee's desk without his knowledge, constitutes no delivery of the paper unless he afterwards receives it.⁸ But a note may be delivered to the

¹*Ex parte Cote*, L. R. 9 Ch. App. 27 (1873). This is the case also in England until the complete paper is mailed. If the paper is cut into two pieces for safety (a common practice in England, at least,) and half of it sent by mail, it is revocable, and therefore not delivered until the other half is sent, *Smith v. Mundy*, 29 L. J. Q. B. 172 (1860). See, too, *Redmayne v. Burton*, 2 L. T. (N. S.) 324 (1860).

²*Muller v. Pondir*, 55 N. Y. 325 (1873), affirming 6 Lans. 472 (1872).

³*King v. Lambton*, 5 Price 428 (1818). So, putting a bill addressed to the payee in an office letter-box, from which it is stolen before it can be mailed, is no delivery, *Arnold v. Cheque Bank*, L. R. 1 C. P. D. 584 (1876).

⁴*Wilde v. Sheridan*, 21 L. J. Q. B. 260 (1852).

⁵*Snaith v. Mingay*, 1 M. & S. 87 (1813). So, a bill signed abroad and sent to drawer's agent in London, *Barker v. Sterne*, 9 Exch. 683 (1854).

⁶*Buckley v. Hann*, 5 Exch. 43 (1856).

⁷*Hyde v. Goodnow*, 3 N. Y. 266 (1850).

⁸*Kinne v. Ford*, 52 Barb. 194 (1868); *Chicopee Bank v. Phila. Bank*, 8 Wall. 641 (1869). In this case it was held that a bill left in a letter on the desk of a bank cashier, and lost in a crack of the desk before it reached his hands, was not sufficiently presented.

payee without his knowing its contents, *e. g.* in a sealed envelope; and if for value and so expressed, this will be a sufficient delivery to support a recovery after the maker's death.¹ If, however, it is merely left among the maker's papers in an envelope directed to the payee, and is intended to operate as a legacy without the formalities required in a will, it will not be binding upon the maker's estate.²

§ 219. **Constructive Delivery.**—Delivery may be constructive instead of actual. Thus, an order directing its delivery by the person holding the instrument as collateral or in escrow will amount to the same thing as an actual delivery of the paper.³ So, executing a transfer of a bill or note which is in the hands of a pledgee, will amount to a delivery of it at the time of the transfer, subject, of course, to the rights of the pledgee.⁴ So, an agreement with the maker for the settlement of a note for less than its face, is constructively a redelivery of it to him.⁵ But an agreement for the delivery of a certain bill of exchange in pledge, on the arrival of the steamer by which it had been forwarded, constitutes only an equitable delivery and is subject to all equities existing against the payee who made the agreement, and such a bill may be stopped *in transitu* by the drawer before its actual delivery under the agreement.⁶

¹North v. Case, 2 Lans. 264 (1869), affirmed as Worth v. Case, 42 N. Y. 362 (1870). The envelope in this case was indorsed "Not to be unsealed while I live and returned to me any time I may wish it."

²Gough v. Findon, 7 Exch. 48 (1851). So, too, a note found among the maker's papers at his death payable to his brother, but never delivered to him or brought in any way to his knowledge, has no validity as a note or debt of the maker, Disher v. Disher, 1 P. Wms. 204 (1712).

³Howe v. Ould, 28 Gratt. 1 (1876).

⁴Fisher v. Bradford, 7 Me. 28 (1830). Although the note has not been actually delivered to the transferee until after its maturity, Grimm v. Warner, 45 Iowa 106 (1876). And a note has been held to be sufficiently delivered to B., although payable to a deceased payee A. "if she calls for it," and found among A.'s papers at her death, it being drawn "to be paid to B. by her order," if A. did not call for it. Blanchard v. Sheldon, 43 Vt. 512 (1871).

⁵Stewart v. Hidden, 13 Minn. 43 (1868). So, if a note is tendered in accordance with an agreement to transfer it in part payment for goods purchased, and is subsequently burned while still in the hands of the purchaser of the goods, this is a sufficient delivery to sustain an action against the maker, Des Arts v. Leggett, 16 N. Y. 582 (1858).

⁶Muller v. Pondir, 55 N. Y. 325 (1873), affirming 6 Lans. 472 (1872).

It is not necessary, however, to a valid delivery that the person to whom the paper is delivered should have any beneficial interest in it. Without having any such interest he may maintain an action if the paper has been lawfully delivered to him as the holder.¹

§ 220. **Intention to Deliver Necessary.**—Although delivery is generally marked and accompanied by immediate change of possession, this is not of itself sufficient to make a good delivery. An intention to deliver the paper must accompany the act in order to make a complete and valid delivery. If the paper be handed to the payee for him to look at, and carried off by him against the maker's will, and in spite of his resistance, there is no delivery to him.²

So, if a signature be written on blank paper merely for the purpose of identifying the handwriting or signature, handing such paper to one who afterwards writes a note over it, is no delivery; and the writing of the note is a forgery on which the supposed maker is not even liable to a *bona fide* holder.³ So, if a note be drawn in sport without any intention to deliver it as a note, and be carried off by the payee, without the knowledge or against the will of the maker, it will not constitute a delivery. But in such case the want of delivery cannot be set up in defense to the note in the hands of a *bona fide* holder.⁴ So, if a note be drawn and left as a mere memorandum of an arrangement to be made, this will not be a sufficient delivery of it, and the defense will be available in a suit brought by the payee.⁵ And in such a case parol evidence of the whole arrangement or contract is admissible.⁶

¹Austin v. Birchard, 31 Vt. 589 (1859). But a non-negotiable instrument, delivered to a bailee for transmission merely, will not give him such apparent title as to render a fraudulent transfer by him effectual, Midland R. R. Co. v. Hitchcock, 10 Stew. 549 (1883).

²Carter v. McClintock, 29 Mo. 464 (1860).

³Caulkins v. Whisler, 29 Iowa 495 (1870).

⁴Shipley v. Carroll, 45 Ill. 285 (1867). So of a note indorsed in blank by the payee and stolen from his desk, Gould v. Segee, 5 Duer 260 (1856).

⁵Ruggles v. Swanwick, 6 Minn. 526 (1861).

⁶Hopper v. Eiland, 21 Ala. 714 (1852).

Again, if a note be delivered by the maker under the mistaken idea that it is a paper of different character, the mistake being induced by the payee's fraud and the maker being guilty of no negligence in the matter, he will not be liable for it.¹ But if in such case the maker was guilty of negligence, *e. g.* in not reading the paper, he cannot avail himself of the defense against a *bona fide* holder.²

Where a note, payable to A. or bearer, is stolen from the maker by B. before it has been delivered to the payee, it will be void for want of delivery in the hands of a holder with notice.³ So, where a note was left by the maker on his table and carried off, without his authority and without any negligence on his part, by the payee, it was held that the want of delivery constituted a good defense even against a *bona fide* purchaser for value.⁴ In these cases the paper had had no valid inception. But a negotiable government bond stolen from the owner can be held against him in an action of trover brought against a *bona fide* holder.⁵

§ 221. **Delivery After Maker's Death—After Dissolution of Firm.**—As delivery constitutes part of the complete execution of commercial paper, it follows that no delivery can be made after the death of the maker by his executor.⁶ So, if made for the accommodation of the payee, no delivery can be made by him after the maker's death.⁷ So, a note drawn payable to the maker's own order cannot be delivered after

¹Taylor v. Atchison, 54 Ill. 196 (1870).

²Chapman v. Rose, 56 N. Y. 137 (1874).

³Hall v. Wilson, 16 Barb. 548 (1853).

⁴Burson v. Huntington, 21 Mich. 415 (1870).

⁵Jones v. Nellis, 41 Ill. 482 (1866).

⁶Clark v. Sigourney, 17 Conn. 511 (1846). So, delivery by the payee of a note to his sister to deliver to A. B. can only be sustained as a *donatio causa mortis*, since otherwise the authority given by the payee to his agent was revoked by his death, Sessions v. Mosely, 4 Cush. 87 (1849).

⁷Perry v. Crammond, 1 Wash. C. C. 100 (1804). In this case it was said by Washington, J., that delivery after the maker's death by the payee "might not be open to objection," if there had been a valid consideration between the maker and the indorsee. In like manner, an accommodation indorsement cannot be used after the indorser's death, and is without effect in the hands of a purchaser with notice, Smith v. Wyckoff, 3 Sandf. Ch. 77 (1845).

his death by the heir.¹ But it has been held in a recent case that a note delivered to A. to deliver after the maker's death to the payee, was sufficiently delivered, A. being regarded in this case as the agent of the payee.²

In like manner, a partnership note cannot be delivered after the dissolution of the partnership.³ And if so delivered by either partner, it will not be binding on the firm, although drawn before its dissolution.⁴

§ 222. **Delivery—To an Agent.**—While a negotiable instrument remains in the maker's hands, or in the hands of his agent, to whom it has been given for the purpose of delivery, it is still undelivered and incomplete.⁵ Thus, if a man draws a note in Italy and sends it to his agent in England for delivery there, it will be of no force until delivered by the agent in England.⁶ But where a note is indorsed in blank and delivered to an agent for the purpose of sale, and is fraudulently transferred by him as collateral for a debt of his own, the maker cannot set up want of delivery against a *bona fide* purchaser for value.⁷ Where, however, a blank paper was indorsed by A. and delivered to B. to obtain his brother's signature and then deliver to C., and was taken by the brother from B. and delivered to D. in settlement of a precedent debt, such non-delivery constitutes a good defense against D.⁸ And where two persons are liable as joint judgment-debtors, and a joint note is executed by one and delivered to the other to be signed by him and negotiated for the purpose of raising money to pay the judgment, and he pays

¹Bromage v. Lloyd, 1 Exch. 32 (1847).

²Giddings v. Giddings, 51 Vt. 227 (1878).

³Woodford v. Dorwin, 3 Vt. 82 (1830).

⁴Gale v. Miller, 54 N. Y. 536 (1874), affirming 1 Lans. 451, 44 Barb. 420.

⁵Brind v. Hampshire, 1 M. & W. 365 (1836).

⁶Chapman v. Cottrell, 13 W. R. 843 (1865).

⁷Morris v. Preston, 93 Ill. 215 (1879).

⁸Lenheim v. Wilmarding, 55 Penna. St. 73 (1867), the holder in such case not being held in Pennsylvania to be a holder for value without notice. But see, *contra*, Whitmore v. Nickerson, 125 Mass. 496 (1878), where the note was delivered to the maker to be signed by his firm name and was signed by his individual name, and sued upon by a subsequent purchaser.

the judgment but does not negotiate the note, he cannot hold it as a delivered note against his co-debtor.¹

§ 223. A note may, however, be delivered to the agent of the payee or the indorsee, although the principal know nothing of such delivery at the time.² So, it may be delivered to an attorney for the use of the indorsee;³ or to the payee's agent, subject to be changed in form, to be accepted by him if not changed.⁴ A good delivery may even be made to an unauthorized agent, and may be ratified subsequently by the principal. His bringing a suit upon the instrument would be a ratification in such case.⁵ And it has been held that delivery to a father of a promise to pay a debt due the son is sufficient.⁶ So, delivery to a trustee is sufficient delivery to the *cestui que trust*.⁷ But where a note is given to an unauthorized agent, *e. g.* to a city treasurer for payment of city taxes, this is no sufficient delivery of the instrument, unless it is accepted by the corporation.⁸

Neither can delivery of a bill or note be made to a stranger, *e. g.* where the paper is taken originally and discounted by another person than the payee named in it.⁹ Where, however, a note was made for the purpose of procuring a loan, which was refused by the payee named in it but made by the plaintiff, he taking the note from the payee, the circumstances of the loan were held to be sufficient evidence to establish a proper delivery.¹⁰

¹ Thomas v. Watkins, 16 Wis. 549 (1863).

² Lysaght v. Bryant, 9 C. B. 46 (1850).

³ Richardson v. Lincoln, 5 Metc. 201 (1842).

⁴ Bodley v. Higgins, 73 Ill. 375 (1874).

⁵ Ancona v. Marks, 7 H. & N. 686 (1862).

⁶ Mason v. Hyde, 41 Vt. 232 (1868). So, a note may be received by mail by a husband for his wife, Funk v. Lawson, 12 Bradw. 229 (1832).

⁷ Tucker v. Bradley, 33 Vt. 324 (1860). But see Latter v. White, L. R. 5 H. L. 578 (1872).

⁸ Crowell v. Osborne, 14 Vroom 335 (1881).

⁹ First Nat. Bank v. Strang, 72 Ill. 559 (1874); Dewey v. Cochran, 4 Jones 184 (1856); Adams Bank v. Jones, 16 Pick. 574 (1835); Prescott v. Brinsley, 6 Cush. 233 (1850). And suit cannot be brought in the payee's name for the use of such other party, *Ib.* See, however, as to actions on notes so delivered, 1 Ames L. C. on Bills and Notes p. 135.

¹⁰ Hayden v. Thayer, 5 Allen 462 (1862).

§ 224. **Instrument takes Effect from Delivery.**—As a general rule, contracts of a commercial character, like others, take effect from their delivery only;¹ although such delivery take place after the date of the instrument.² In the absence, however, of evidence to the contrary, it is presumed that a bill or note was delivered at the time it bears date;³ and if accepted with no date of acceptance expressed, the acceptance is presumed to have been made before maturity of the bill and within a reasonable time after its date.⁴ So, an indorsement, without date expressed, is presumed to have been made and delivered before the maturity of the instrument.⁵ In reckoning, however, the maturity of a note payable a certain time after date, the expressed date and not the time of delivery is the point to reckon from.⁶ But if there is no date expressed, the maturity of such instrument can only be reckoned from the time of its delivery.⁷ In determining what local law governs an instrument, respect is had to its delivery and not to the place where it was signed;⁸ nor to the place where the loan out of which it grew was made.⁹

¹ Daniel 76; *Lansing v. Gaine*, 2 Johns. 300 (1807); *Woodford v. Dorwin*, 3 Vt. 82 (1830); *Lovejoy v. Whipple*, 18 Vt. 379 (1846); *Hill v. Dunham*, 7 Gray 543 (1856); *Gale v. Miller*, 54 N. Y. 536 (1874), affirming 1 Lans 451, 44 Barb. 420; *Baldwin v. Freyendall*, 10 Bradw. 106 (1881). And this is provided by statute in the *Argentine Republic* (1862 Cod. Com. Art. 767).

² Daniel 76; 1 Parsons 49; *Lansing v. Gaine*, 2 Johns. 300 (1807). But an accommodation note made before January 1st, 1852, but not put into circulation until after, has been held to take effect from its date, with reference to a homestead exemption created in the interim, *Ladd v. Dudley*, 45 N. H. 61 (1863).

³ Daniel 76; 1 Parsons 49; *De la Courtier v. Bellamy*, 2 Show. 422; *Giles v. Bourne*, 6 M. & S. 73 (1817); S. C., 2 Chitty 300; *Hague v. French*, 3 Bos. & P. 173 (1802); *Anderson v. Weston*, 6 Bing. N. C. 296 (1840); *Baldwin v. Freyendall*, *supra*. So, as to a statement of account, *Sinclair v. Bagdaley*, 4 M. & W. 312 (1838). But it seems that this presumption will not be made in favor of a writing, *e. g.* a receipt indorsed on a bond taking it out of the operation of the Statute of Limitations, where the writer had an interest in falsifying the date, *Cremer's Estate*, 5 Watts & S. 331.

⁴ *Roberts v. Bethell*, 12 C. B. 778 (1852).

⁵ *Smith v. Edgeworth*, 3 Allen 233 (1861). In this case the presumption was overcome by proof of illegality of consideration. The jury may properly determine from circumstances attending the transfer of a bill the time at which the indorsement was made, *Anderson v. Weston*, 6 Bing. N. C. 296 (1840).

⁶ *Bumpass v. Timms*, 3 Sneed 459 (1856).

⁷ *Giles v. Bourne*, 6 M. & S. 73 (1817).

⁸ *Mott v. Wright*, 4 Biss. C. C. 53 (1865); *Campbell v. Nichols*, 4 Vroom 81 (1868); *Freese v. Brownell*, 6 *Ib.* 285 (1871).

⁹ *Read v. Edwards*, 2 Nev. 262 (1866).

As we have already seen, in considering the subject of instruments executed in blank, the authority to fill such blanks is only implied from a proper delivery of the instrument, and does not exist where the paper has been stolen from the maker before the blanks were filled.¹

§ 225. **Delivery—On Sunday.**—The question as to the time when an instrument was delivered often becomes a matter of importance, where the date or delivery falls on a Sunday. Sunday contracts are prohibited by statute in England and in most of the United States.² A note or bill made and delivered on Sunday is, in general, void.³ So, an indorsement made and delivered on Sunday.⁴ This is also true of a contract for sale of goods;⁵ even though the delivery be made on Sunday in carrying out a proposition made on a week day.⁶ And it is held in some States that a bill or note made on Sunday cannot be ratified afterwards on a week day, being void by statute.⁷ This, however, is denied in other States.⁸

It has been held in Iowa that the date being *prima facie* the time of execution, a note dated on Sunday is *prima facie* void.⁹ And in Massachusetts, where the entry of a sale on the seller's books bore date on Sunday, in suing for the pur-

¹Ledwich v. McKim, 53 N. Y. 307 (1873).

²The Statute of 29 Car. II. c. 7, provides that no person "shall do or exercise any worldly business or work of their ordinary calling upon the Lord's Day" under a penalty. As to whether the acceptance of a bill of exchange falls within such prohibition, see Begbie v. Levi, 1 Crompt. & J. 183 (1830).

³Towle v. Larrabee, 26 Me. 464 (1847); Pattee v. Greely, 13 Mete. 284 (1847); O'Donnell v. Sweeny, 5 Ala. 467 (1843); Dodson v. Harris, 10 Ib. 566 (1846); Bosley v. McAllister, 13 Ind. 565 (1859); Brimhall v. Van Campen, 8 Minn. 13 (1862); Adams v. Hamell, 2 Doug. 73 (Mich. 1845), although this is said not to be true at common law.

⁴Saltmarsh v. Tuthill, 13 Ala. 390 (1848).

⁵Lyon v. Strong, 6 Vt. 219 (1834); Berrill v. Smith, 2 Miles 402 (1840); Banks v. Werts, 13 Ind. 203 (1859).

⁶Smith v. Foster, 41 N. H. 215 (1860).

⁷Day v. McAllister, 15 Gray 433 (1840). So, too, *obiter*, as to a contract for land, Butler v. Lee, 11 Ala. 885 (1847). So, too, Banks v. Werts, 13 Ind. 203 (1859).

⁸Love v. Wells, 25 Ind. 503 (1865); Clough v. Davis, 9 N. H. 500 (1833); Smith v. Case, 2 Oregon 190 (1866). Especially if the action rests partly on fraudulent representations made on a week day inducing a Sunday sale which was afterward ratified, Winchell v. Carey, 115 Mass. 560 (1874).

⁹Sayre v. Wheeler, 31 Iowa 112 (1870).

chase-money he was required to show that the contract was not made on Sunday.¹ On the other hand, it has been held that the fact of a note being signed and dated on Sunday is no evidence of its delivery on that day, and that it was *prima facie* a valid contract.² So, in Massachusetts and in Maine, where the legal Sunday ends by statute at sunset, it is held that the date of a note on Sunday is no evidence of its execution before sunset, and that it is therefore *prima facie* valid;³ the time of delivery in such case being a question for the jury to determine.⁴ Where a bill is dated and drawn on Sunday and the acceptance is not dated, it will not be presumed to have been accepted on Sunday.⁵

§ 226. Where a bill or note is dated on Sunday, delivery on another day may in all cases be shown.⁶ It has been held, however, that an indorsement by way of guaranty, delivered to the maker on a Sunday, is void even where the note was subsequently delivered on a week day by the maker to an innocent payee, the payee not occupying the position of a *bona fide* purchaser for value.⁷ But where a note made upon Sunday is dated on a week day, it is valid in the hands of a *bona fide* purchaser for value.⁸ And where it was merely signed on Sunday but delivered on a week day, it follows, from what has been already said, that it is valid;⁹ even though the delivery was made by an agent who received his authority from the maker on Sunday.¹⁰ *A fortiori*, where the date and delivery both fall on a week day, the note is

¹Bustin v. Rogers, 11 Cush. 346 (1853).

²Dohoney v. Dohoney, 7 Bush 217 (1870).

³Nason v. Dinsmore, 34 Me. 391 (1852).

⁴Hill v. Dunham, 7 Gray 543 (1856).

⁵Begbie v. Levi, 1 Crompt. & J. 180 (1830).

⁶Aldridge v. Branch Bank, 17 Ala. 45 (1849).

⁷Gilbert v. Vachon, 69 Ind. 372 (1879).

⁸Cranson v. Goss, 107 Mass. 439 (1871); Clinton Nat. Bank v. Graves, 48 Iowa 228 (1878); Vinton v. Peck, 14 Mich. 237 (1866). So, too, in the case of a bond, Commonwealth v. Kendig, 2 Penna. St. 448 (1848).

⁹Hilton v. Houghton, 35 Me. 143 (1853); Fritsch v. Heislen, 40 Mo. 555 (1867); Lovejoy v. Whipple, 18 Vt. 379 (1846); King v. Fleming, 72 Ill. 21 (1874).

¹⁰Flanagan v. Meyer, 41 Ala. 132 (1867).

valid although signed on Sunday.¹ In like manner a bill for the sale of goods contracted on Sunday is sufficient, if the goods be delivered on Monday.²

§ 227. **Delivery—On Condition—Escrow.**—It frequently happens that the delivery of commercial paper is made upon condition, and is not to take effect until such condition be fulfilled.³ And such paper is often delivered in escrow, and in such case the maker is only liable upon the happening of the contingency.⁴ But a note cannot be delivered in escrow to the payee himself;⁵ or to the agent of the payee.⁶ If, however, a note be signed by one person and delivered to the payee to be signed by another before it is further circulated, the want of such other signature will be no defense to a suit by a *bona fide* holder.⁷ But where suit is brought by the payee, its conditional delivery to him may be set up in defense.⁸ And a deed delivered in escrow to the solicitor of the grantee has been held not to be binding on the grantor until the condition was fulfilled.⁹

¹ King v. Fleming, 72 Ill. 21 (1874).

² Smith v. Bean, 15 N. H. 577 (1844).

³ 1 Daniel 78; Story on Prom. Notes § 56 n. 4; Bell v. Ingestre, 12 Q. B. 317 (1848); Benton v. Martin, 52 N. Y. 570 (1873); Seymour v. Cowing, 4 Abb. App. Dec. 200 (1864); Miller v. Gambie, 4 Barb. 146 (1848); Sweet v. Stevens, 7 R. I. 375 (1863); Ward v. Churn, 18 Gratt. 801 (1868). So, too, the delivery of an agreement for the sale of goods may be conditional, Pym v. Campbell, 6 El. & Bl. 370 (1856).

⁴ 1 Daniel 78; 1 Parsons 51; Couch v. Meeker, 2 Conn. 302 (1817); Taylor v. Thomas, 13 Kans. 217 (1874).

⁵ Badcock v. Steadman, 1 Root 87 (1789); Massmann v. Holscher, 49 Mo. 87 (1871); Henshaw v. Dutton, 59 Mo. 139 (1875); Jones v. Shaw, 67 Ib. 667 (1878); Johnson v. Branch, 11 Humph. 521 (1851). But see, *contra*, Alexander v. Wilkes, 11 B. J. Lea 221 (1883). So, Brown v. Reynolds, 5 Sneed 639 (1858), where delivery of a note to the payee to hand to a third person for safe-keeping was held to be a good escrow; and Breedon v. Grigg, 8 Baxt. 163 (1874), where the maker of a note was allowed to prove by parol that he had delivered it to the payee conditionally. In cases where a note was signed by a surety and delivered to the payee to procure a certain other surety and not to use it until he had done so, the condition was held void in Johnson v. Branch, *supra*, but enforced by injunction in Majors v. McNeilly, 7 Heisk. 294 (1872).

⁶ Stewart v. Anderson, 59 Ind. 375 (1877); Scott v. State Bank, 9 Ark. 36 (1848).

⁷ Massmann v. Holscher, 49 Mo. 87 (1871). But when the defense is set up that the delivery was only in escrow, the holder must show himself to be a holder for value without notice and before maturity, Vallett v. Parker, 6 Wend. 615 (1831).

⁸ Jefferies v. Austin, 1 Stra. 674.

⁹ Watkins v. Nash, L. R. 20 Eq. Cas. 262 (1873).

§ 228. In general where the delivery of commercial paper is conditional, the non-fulfillment of the condition constitutes a good defense to the instrument, *e. g.* a condition to redeliver the note if another note and account, for which it was given, could not be used;¹ or if the maker wished to withdraw from a college subscription, for which it was given;² or a condition that others should sign as co-makers or as co-sureties.³ So, where a non-negotiable note is executed by a surety and left with his principal to be delivered upon a certain condition, and it is delivered by the principal in violation of the agreement, the surety will not be bound.⁴ So, a note for subscription to stock, put into escrow and delivered in violation of the condition, will not render the maker liable.⁵ So, a note payable to a contractor for erecting a public building "or bearer," left in escrow to be delivered on performance of the building contract, cannot be subsequently delivered to another contractor, who finished the building at a later time than the original contract specified.⁶ So, if an indorsement is made on condition of the discontinuance of a suit, the non-performance may be set up in defense.⁷

§ 229. But it has been held that a condition that certain old notes for which the note in suit was given, should be returned was a condition subsequent and could not avail as a defense.⁸ If the condition is indorsed on the note, avoiding it if a dispute should arise, such indorsement is part of the note and renders it non-negotiable.⁹

¹ *Simonton v. Steele*, 1 Ala. 357 (1840).

² *Hillsdale College v. Thomas*, 40 Wisc. 661 (1876).

³ *Leaf v. Gibbs*, 4 C. & P. 466 (1830); *Miller v. Gambie*, 4 Barb. 146 (1848). At suit of a mere depository, *Stricklin v. Cunningham*, 58 Ill. 293 (1871); or of the payee taking the instrument with notice of the condition, *Easter v. Minard*, 26 Ill. 494 (1861).

⁴ *Daniels v. Gower*, 54 Iowa 319 (1880). So, too, in case of a sealed bond, *The People v. Bostwick*, 32 N. Y. 445 (1865); *Lovett v. Adams*, 3 Wend. 380.

⁵ *Roberts v. McGrath*, 38 Wis. 52 (1875); *Roberts v. Wood*, *Ib.* 60.

⁶ *McLean v. Nugent*, 33 Wis. 353 (1874).

⁷ *Bookstaver v. Jayne*, 60 N. Y. 145 (1875).

⁸ *Goddard v. Cutts*, 11 Me. 440 (1834). See, too, *Henshaw v. Dutton*, 59 Mo. 139 (1875).

⁹ *Hartley v. Wilkinson*, 4 Campb. 127 (1875).

Where a bill is indorsed and delivered on condition that certain notes be taken up, the breach of this condition may be proved under the general issue.¹ If a note is delivered for a policy of insurance, to take effect when the policy should be received, and is indorsed before that time, the question of delivery is one for the jury.²

And where a note was delivered to the payee in violation of a condition between the principal and surety executing it, and the payee knew of the condition, relief was given to the surety in equity and a cancellation of the note decreed against the payee.³ So, where a bill of exchange is delivered with a bill of lading attached, a condition is implied which is forfeited by detaching the bill of lading, and acceptance may be refused in such case.⁴ But where a compromise is made by an insolvent with his creditors, conditioned on the acceptance of all, and notes are given in settlement with an indorser, such indorsement amounts to a waiver of the condition on which the compromise was made.⁵

§ 230. **Delivery—Defense for Want of.**—The cases of defense above enumerated are, unless otherwise stated, all cases of defense allowed against the original payee or a holder with notice or without consideration. That a note has been delivered in escrow is no valid defense at suit of a *bona fide* holder for value;⁶ although it may be set up in New York against

¹ Bell v. Ingestre, 12 Q. B. 317 (1848).

² Sweet v. Chapman, 7 Hun 576 (1876).

³ Devries v. Shumate, 53 Md. 211 (1879).

⁴ Lanfear v. Blossman, 1 La. An. 148 (1846).

⁵ Whittemore v. Obear, 58 Mo. 280 (1874).

⁶ Vallett v. Parker, 6 Wend. 615 (1831); Moore v. Miller, 6 Lans. 396 (1872); Fearing v. Clark, 16 Gray 474 (1860). This is true also of a note delivered for a special purpose and fraudulently diverted, Woodhull v. Holmes, 10 Johns. 231. But a note delivered by an accommodation maker to his co-maker to negotiate, although made payable to a payee named therein and given for a special purpose and indorsed but never accepted by such payee, has been held to have been sufficiently delivered, Morris v. Morton, 14 Neb. 358 (1883). And where the payee is ignorant of the fraud which was perpetrated by the maker's agent, who thereby obtained and delivered the check to the payee, the latter occupies the position of a *bona fide* holder as to this defense, Watson v. Russell, 3 B. & S. 34 (1862), affirmed, 5 Ib. 968. So, too, a transfer of stock "for value received," McNeil v. Tenth Nat. Bank, 46 N. Y. 325 (1871). But a payee, who knew that the note was given to the maker's agent for another purpose and whose name was written in a blank

one who has taken the paper merely as security for a precedent debt without other consideration.¹ Where a note, therefore, is given to a company for stock, on condition that it be held until all the stock be subscribed and the railroad be finished, and on the further condition that the railroad be finished in two years, the breach of these conditions will constitute no defense at suit of a *bona fide* holder for value.² And where a note is delivered to the payee's agent in consideration partly for another note, and is not to be delivered to the payee until such other note is paid, it has even been held that the payee receiving such note from the agent without notice of the condition violated, takes it clear of the condition.³ Again, where stockholders' notes have been given to make up the impaired capital of a corporation, and deposited with a bank with the agreement that they should be credited and drawn against, only as they were made good by the company's dividends, and have been transferred in violation of this agreement by the bank as collateral, the company to whom they were made cannot recover them from such transferees.⁴

And where a note after being signed was to have had a condition added to it, but was carried off by the payee against the maker's will before this was done, it was held to be good in the hands of a *bona fide* holder for value.⁵ It has been held, however, in some cases, that where a note left in escrow was delivered in violation of conditions, this might be set up even at suit of a *bona fide* holder for value.⁶ This has been held, too, in favor of a surety executing a note on condition of its execution by a co-surety;⁷ and in the case of the con-

left by the maker, is not a *bona fide* holder, and takes the note subject to the condition on which it was delivered to the agent, *Mills v. Williams*, 16 So. Car. 593 (1881).

¹ *Prentiss v. Graves*, 33 Barb. 621 (1860).

² *Foy v. Blackstone*, 31 Ill. 538 (1863).

³ *Stewart v. Anderson*, 59 Ind. 375 (1877).

⁴ *Black River Ins. Co. v. N. Y. L. & T. Co.*, 73 N. Y. 282 (1878).

⁵ *Clarke v. Johnson*, 54 Ill. 296 (1870).

⁶ *Chipman v. Tucker*, 38 Wisc. 43 (1875).

⁷ *Ayres v. Milroy*, 53 Mo. 516 (1873). But see, *contra*, *Deardorff v. Foreman*, 24 Ind. 481 (1865).

ditional delivery of a bond by a surety.¹ The objection to a delivery on the ground of its escrow character, is, however, precluded in a case where two exchange notes were both put in escrow and the maker of one takes the other from escrow and holds it.²

§ 231. **Parol Evidence.**—Where want of delivery or breach of condition or escrow in the delivery is available as a defense, it may be shown by parol evidence.³ So, it may be shown by parol that an undated contract in writing was delivered to take effect in future;⁴ or that a contract of sale was to be void, if A. should not within a reasonable time consent to it.⁵ And where a note was delivered or was placed in escrow to be delivered on a certain condition, and the depositary died before the performance of the condition, his declarations as to the condition are admissible in defense against an indorsee after maturity of the note.⁶ But even at suit of the payee parol evidence of such condition has been held to be inadmissible on account of the absolute form of the note.⁷

¹ *Ward v. Churn*, 18 Gratt. 801 (1868).

² *Smith v. Smith*, 13 C. B. (N. S.) 418 (1862).

³ *Benton v. Martin*, 52 N. Y. 570 (1873); *Lattimer v. Hill*, 8 Hun 171 (1876); *Sweet v. Stevens*, 7 R. I. 375 (1863); *Watkins v. Bowers*, 119 Mass. 383 (1876); *Ricketts v. Pendleton*, 14 Md. 320 (1859); *Bradley v. Bentley*, 8 Vt. 243 (1836); *Mosher v. Rogers*, 20 Cent. L. J. 316 (Ill. Sup. Ct. 1884).

⁴ *Davis v. Jones*, 17 C. B. 625 (1856); *Murray v. Earl of Stair*, 2 B. & C. 82; S. C., 3 D. & R. 278. But a different result was reached where the instrument had a date from which it appeared on its face to take effect, *Williams v. Jones*, 5 B. & C. 108; S. C., 7 D. & R. 549.

⁵ *Wallis v. Littell*, 11 C. B. (N. S.) 369 (1861).

⁶ *Goodson v. Johnson*, 35 Tex. 622 (1871).

⁷ *Roche v. Roanoke Seminary*, 56 Ind. 198 (1877); *Massmann v. Holscher*, 49 Mo. 87 (1871).

III. INLAND AND FOREIGN BILLS.

232. Origin—Distinction.

233. Foreign Bills in the United States.

234. Indorsement—Parts—Protest—Pleading.

235. Presumption from Date.

236. American Statutes.

§ 232. **Origin and Distinction.**—When bills of exchange are first mentioned is a matter of great uncertainty. There is no trace of them in the Roman law.¹ According to the authority of Montesquieu, they were invented by the Jews and Lombards.² At all events, it has been shown clearly that they were in use in the fourteenth century, in Venice, and were probably introduced into England before the end of that century.³

A bill of exchange is either foreign or inland. Foreign bills, as the term is used in the United States, are either drawn or payable abroad. Such bills first received judicial sanction in England in the time of James I.⁴ Inland bills seem to have originated in England in the time of Charles II.⁵ At first mercantile effect was given by the courts only to bills drawn between English and foreign merchants.⁶ But the principles applied to them were soon extended to all traders and finally to all persons whether traders or not.⁷

Inland bills are drawn and payable in the same State or country.⁸ A bill drawn in London, payable there to the order of a London merchant, upon a merchant residing at Brussels, and accepted by him there, has been held to be an

¹ Pothier, *Contrat de Change* pl. 6.² Chitty 15; 2 Blackst. Com. 467.³ Claxton v. Swift, 2 Show. 441.⁴ Martin v. Boure, Cro. Jac. 6; Oaste v. Taylor, *Ib.* 306; Hussey v. Jacob, *Ld. Raym.* 88.⁵ Mahoney v. Ashlin, 2 B. & Ad. 378; Amner v. Clark, 2 Crompt. M. & R. 468. Actions on such bills "did first begin," it seems, in the time of Lord Holt, C. J., and depended on proof of a special custom to support them, Buller v. Crips, 6 Mod. 29; 1 Salk. 130; Holt 119.⁶ Oaste v. Taylor, Cro. Jac. 306.⁷ Bromwich v. Loyd, 2 Lutw. 1585; Sarsfield v. Witherly, 2 Vent. 395; Comb. 45; Cramlington v. Evans, 2 Vent. 310.⁸ Story on Bills § 465.

inland bill.¹ And the rule is thus stated by Mr. Chitty: "When both the drawer and the drawee reside in the same State or country, or in that part of the country where the bill is drawn, or when both drawn and payable in the same State or country, although accepted abroad,"² it is an inland bill.

Foreign bills, on the other hand, are "Such as are drawn or payable, or both, abroad."³ *A fortiori*, a bill drawn and payable abroad, is a foreign bill.⁴ This applies also to bills drawn in one realm of the United Kingdom payable in another.⁵ Thus, a bill drawn in England, payable in Scotland or Ireland, was, until recently, by English law a foreign bill.⁶ But under the Act of 1 and 2 Geo. IV. c. 78, a bill drawn and payable in Scotland or Ireland became an inland bill, requiring acceptance in writing.⁷ And by the Act of 19 and 20 Vict. c. 97, § 7, all bills and notes drawn in one part of the British Islands payable in another are made inland bills.⁸ And this provision is continued in force in the Bills of Exchange Act of 1882.⁹ For the purposes of the present British Stamp Act, only bills and notes made or purporting to be made out of the United Kingdom are to be deemed foreign bills.¹⁰

§ 233. **Foreign Bills in the United States.**—In the United States it is to be remembered that the States are, in law, foreign to each other.¹¹ Thus, a bill drawn in Maine, payable

¹Chitty 14; *Amner v. Clark*, 2 Crompt. M. & R. 468. See 5 Tyrw. 942.

²Chitty 14.

³Byles 396; and in this sense one realm of the United Kingdom is foreign to another, *Ib.*

⁴1 Parsons 55.

⁵*Godfrey v. Coulman*, 13 Moo. P. C. C. 11; *Heywood v. Pickering*, L. R. 9 Q. B. 428.

⁶*Mahoney v. Ashlin*, 2 B. & Ad. 478.

⁷Byles 397; *Mahoney v. Ashlin*, *supra*.

⁸Byles 398; *Griffin v. Weathersby*, L. R. 3 Q. B. 753; *Heywood v. Pickering*, *supra*.

⁹45 and 46 Vict. ch. 61 § 4.

¹⁰Byles 398; 33 and 34 Vict. c. 97 §§ 51, 52.

¹¹1 Daniel 10; 1 Edwards § 9, 2 Edwards § 793; 1 Parsons 56; Story on Bills §§ 23, 465; Story Cfl. § 281 &c.; *Buckner v. Finley*, 2 Pet. 58 (1829); *Bank of United States v. Daniel*, 12 Pet. 32 (1838); *Commercial Bank v. Varnum*, 49 N. Y. 269 (1872); *Dickens v. Bent*, 10 Pet. 572; *Ocean Nat. Bank v. Williams*, 102 Mass. 141 (1869).

in Massachusetts, is a foreign bill.¹ And, in general, a bill drawn in one State payable in another is such,² although all parties may be citizens of one State.³ In like manner, if a bill is drawn, in England, on a house in Paris, and accepted and payable in Paris, it is a foreign bill.⁴ On the other hand, it has been held, in Kentucky, that if a bill is drawn by a citizen of Kentucky on a citizen of Louisiana, and payable in Louisiana, it is a foreign bill.⁵

It has been said by some text writers that a bill is foreign "when drawn by a person in one State or country upon a person in a foreign State or country."⁶ And many cases in the United States have held such bills drawn between different States to be foreign.⁷ Although it does not appear, it is probable in most of the cases from the form of the bill, that it was payable, at least by implication, in the place where the drawee resided. Indeed, the place of payment of a bill of exchange is often expressed in no other manner. But it has also been held that a bill drawn in one State upon a citizen or resident of another is a foreign bill.⁸ So, a bill drawn and payable, in England, upon a Boston house, and accepted in England by a partner of the Boston house who was there at the time, has been held to be a foreign bill, as though accepted in Boston.⁹

¹ Daniel 8; Warren v. Coombs, 20 Me. 139 (1841); Ticonic Bank v. Stackpole, 41 Ib. 302 (1856).

² And this appears to be the meaning of the definitions of Chitty, Edwards and Story, the bill being generally payable where the drawee resides.

³ Grafton Bank v. Moore, 14 N. H. 142; Freemans Bank v. Perkins, 18 Me. 292; Atwater v. Streets, 1 Doug. 455 (Mich. 1844).

⁴ Rothschild v. Currie, 1 Q. B. 43 (1841).

⁵ Chenowith v. Chamberlin, 6 B. Mon. 60 (1845).

⁶ Chitty 14; 1 Edwards § 8, 2 Ib. § 793; Story on Bills § 22.

⁷ Duncan v. Course, 1 Mill 100 (So. Car. 1817); Phoenix Bank v. Hussey, 12 Pick. 483 (1832); Brown v. Ferguson, 4 Leigh 37 (1832); Wells v. Whitehead, 15 Wend. 527 (1836); Hartridge v. Wesson, 4 Ga. 101 (1848); Commercial Bank v. Varnum, 49 N. Y. 269 (1872); Donegan v. Wood, 49 Ala. 242 (1873); Todd v. Neal, Ib. 266 (1873). And see Lonsdale v. Brown, 4 Wash. C. C. 86 (1821). But in Miller v. Hackley, 5 Johns. 375 (1810), such a bill was held to be an inland bill.

⁸ Aborn v. Bosworth, 1 R. I. 401 (1850).

⁹ Grimshaw v. Bender, 6 Mass. 157 (1809). In this case, p. 160, Parsons, C. J., says: "It is manifest that the remedy contemplated by the parties

§ 234. **Indorsement—Parts—Protest—Pleading.**—An indorsement being equivalent to a bill drawn by the indorser upon the maker of a note, the indorsement of such a note payable in another State is equivalent to a foreign bill.¹ This has been held also to be the case, where a note was drawn in one State, payable to a resident of a second State, and indorsed in a third State.²

Inland bills are generally drawn in a single part, while foreign bills are frequently drawn in sets of three or more parts.³ The chief difference, however, in effect between inland and foreign bills is that the latter require protest and the former do not, except where it is otherwise provided by statute.⁴ At common law where a suit is brought on a foreign bill, it has been held that it should be stated in the declaration to be such, and if so stated, the action cannot be maintained by proving an inland bill or *vice versa*.⁵

§ 235. **Presumption from Date.**—Every bill is *prima facie* an inland bill.⁶ On the other hand, if it appears to be drawn abroad, there is an implied warranty on the part of the indorser that it was in reality so drawn.⁷ And by the British Stamp Act, as has been said, every bill purporting to be drawn out of the United Kingdom is deemed to be a foreign bill.⁸ It was formerly held that an acceptor, knowing such a bill at the time of his acceptance to have been really drawn in England, might allege in defense against even a *bona fide* holder that it was an inland bill, and there-

in the event of the bill being dishonored must be sought in this State where the acceptors lived. From this view of the case the instrument must be considered as a foreign bill."

¹Ticonic Bank v. Stackpole, 41 Me. 302 (1856).

²Carter v. Burley, 9 N. H. 558 (1838).

³Byles 398.

⁴1 Daniel 9.

⁵Byles 398; Armani v. Castrique, 13 M. & W. 443.

⁶Byles 398.

⁷Byles 398; Gompertz v. Bartlett, 2 E. & B. 854.

⁸Byles 398; 33 and 34 Vict. c. 97 §§ 51 and 52 E. See, too, 17 and 18 Vict. c. 83 § 4 (repealed 1870); Siordet v. Kuczynski, 17 C. B. 251.

fore void for want of a stamp.¹ This is now made impossible by the statutes which have been referred to.

In the United States it has been held that a bill, drawn in New York by a Boston merchant on a New York merchant, but dated in Boston, is a foreign bill not only as to *bona fide* holders, but even as to the original parties to it.² And, on the other hand, that a bill between citizens of Illinois, actually drawn in Wisconsin, but dated and made payable in Illinois, is an inland bill, having been so intended by the parties to it.³ If a bill is dated as though drawn abroad, it is presumed to have been so drawn; but parol evidence was formerly admitted, in England, to show the contrary and render the bill void under the Stamp Act.⁴ It may now, however, be regarded as the rule that parol evidence is inadmissible, to render such a bill void as an inland bill, against a holder who has purchased it before maturity for value and in good faith.⁵ And it has been held, in Missouri and Texas, that the courts will not recognize the place of date or payment named in a bill as situated in a foreign country without proof of that fact.⁶

§ 236. **American Statutes.**—In Alabama an inland bill is one drawn and payable in that State, and bills drawn in that State payable elsewhere are foreign.⁷ In California bills drawn and payable in that State are inland bills. All others are foreign.⁸ In Georgia a bill is foreign, if either drawer or drawee reside out of the State.⁹ In Illinois bills appear to be regarded as foreign, if drawn and indorsed in that State

¹ Byles 398; *Steadman v. Duhamel*, 1 C. B. 888.

² *Lennig v. Ralston*, 23 Penna. St. 137 (1854). And see Chapter III., *supra*.

³ *Strawbridge v. Robinson*, 10 Ill. 470 (1849).

⁴ *Jordaine v. Lashbrooke*, 7 T. R. 601. As to what is sufficient evidence, see *Abraham v. Du Bois*, 4 Campb. 269 (1815); *Bire v. Moreau*, 2 C. & P. 376 (1826).

⁵ *Towne v. Rice*, 122 Mass. 67 (1877).

⁶ *Riggin v. Collier*, 6 Mo. 568 (1840); *Cook v. Crawford*, 4 Tex. 420 (1849). *Andrews v. Hoxie*, 5 *Ib.* 171 (1849); *Yale v. Ward*, 30 *Ib.* 17 (1867).

⁷ Alabama (Code 1876 § 2118).

⁸ Cal. Civil Code 1876 § 3224.

⁹ Georgia (Code 1882 § 2773).

and payable out of the United States.¹ And so in Minnesota.² But in Minnesota, if drawn on a drawee out of the State, but within the United States, they are regarded as inland bills.³ In Mississippi domestic bills drawn on that State and payable in it are put on the footing of foreign bills, if over twenty dollars.⁴ So, in New Jersey inland bills drawn in that State and on a drawee there, if over eight dollars and payable at sight or on demand, or at a future time named.⁵ In New York bills, notes and checks payable in any other of the United States than New York, or in any foreign country, are foreign as regards protest and proof of it.⁶ In Virginia it seems that a bill drawn out of the State, payable in it, is a foreign bill, while one drawn in the State on any other of the United States, is not to be so regarded, so far, at least, as protest of the bills is concerned.⁷

¹Illinois R. S. Hurd 1883 p. 771 § 1.

²Minn. G. S. 1878 ch. 26 § 14.

³Minn. G. S. 1878 ch. 23 § 15.

⁴Miss. Rev. Code 1880 § 1128.

⁵N. J. Rev. 1874 p. 898 § 2.

⁶N. Y. R. S. (Bank's 7th ed.) p. 2246 L. 1865 ch. 309.

⁷*Brown v. Ferguson*, 4 Leigh 37, 51 (1832); Va. Code 1873 p. 986 § 7.

IV. PARTS OR SET OF PARTS.

- 237. Condition Expressed.
- 238. Delivery.
- 239. Transfer.
- 240. Presentment and Acceptance.
- 241. Protest—Payment—Action.
- 242. Copies.
- 243. Foreign Statutes.

§ 237. **Condition Expressed.**—Foreign bills of exchange are generally drawn in a set of several parts (duplicate or triplicate, as the case may be,) to guard against delay and loss. The usual number of parts is three, although there may be more or less. Each part should be designated by its number and should refer to the other parts, requiring payment on condition of their being unpaid.¹ It seems that such reference was formerly often omitted in Europe in the first part;² but this practice has never found favor in the United States. All the parts, whatever may be their number, compose one set and constitute but one bill.³ In Great Britain, however, each part requires a stamp.⁴

§ 238. **Delivery.**—All the parts should be delivered together;⁵ and in a transfer of the bill all should be transferred.⁶ And it has been said that an agreement to deliver a foreign bill of exchange, requires the delivery of as many parts as may be desired.⁷ But this has been rightly questioned, and the rule is properly restricted to the usual number of parts (duplicates or triplicates). If the bill is lost

¹ Chitty 178; Story on Bills § 67; 1 Daniel 122; Byles 393. The usual form is as follows:

Thirty days after sight of this my First of Exchange (Second and Third unpaid), pay, &c.

The Civil Code of California provides for any number of parts, each making reference to the others, and all constituting one bill (§ 8173).

² 1 Parsons 59.

³ Byles 393; 1 Daniel 121.

⁴ Chitty 178; 33 and 34 Vict. c. 97 § 55.

⁵ Chitty 178; Story on Bills § 67.

⁶ 1 Daniel 123; Story on Bills § 226.

⁷ Byles 394; Chitty 178; 1 Edwards § 188.

⁸ Story on Bills, § 66; 1 Daniel 121; Chitty 178. In California three parts may be demanded, Civil Code 1872 § 8174.

another set may be demanded.¹ But an action will not lie against prior parties, other than the drawer or payee, for such other parts without proof of their being in their possession.²

§ 239. **Transfer.**—As each and all parts of the bill constitute but one bill, it follows that the indorsement of one part is a transfer of all.³ But the indorsement of one part is no implied warranty of possession of the other parts; although, if the indorser holds them, he may be required to give them up to his indorsee or a subsequent holder.⁴ If, indeed, the indorser indorses and transfers several parts to different holders, he will be liable generally on each.⁵ Thus, if two parts are accepted and negotiated and the drawer knowingly receives the proceeds of both, he will be liable to the *bona fide* holder of the second part, although the acceptor has paid the first.⁶ In like manner, where two parts have been so accepted and negotiated, the surrender of one part to the acceptor will not relieve him from liability on the other.⁷ And if one part is lost and paid to a *bona fide* holder on a forged indorsement, an action will still lie in favor of the rightful holder of the other parts.⁸ It seems, however, that the *bona fide* holder of one part by valid indorsement may claim the other parts even against later *bona fide* indorsees.⁹ And an averment that the defendant indorsed a

¹ Story on Bills § 66.

² Pinard v. Klockman, 3 B. & S. 388; 32 L. J. Q. B. 82.

³ Chitty 179; 1 Edwards § 188; Benj. Chalm. Dig. Art. 27; Société Générale v. Bank, 27 L. T. (N. S.) 849 (1873); Walsh v. Blatchley, 6 Wis. 413 (1853); British Bills of Exchange Act § 71.

⁴ Pinard v. Klockman, *supra*; 1 Daniel 122.

⁵ 1 Daniel 123; British Bills of Exchange Act § 71. And on payment he should have all individual payments returned to him, Byles 394.

⁶ Wright v. McFall, 8 La. An. 120 (1853). And if no condition is contained in the several parts referring to one another, a drawer or acceptor, although not concerned in the transfer of the several parts to different persons, may still be liable on them all, Davison v. Robertson, 3 Dow. 218. And in such case, payment of one part will be no defense against the *bona fide* holder of another, *Ib.*; Chitty 178; 1 Edwards § 188; Story on Bills § 67.

⁷ Holdsworth v. Hunter, 10 B. & C. 449.

⁸ Chitty 178; Cheap v. Harley, 3 T. R. 127. See, too, Smith v. Mercer, 6 Taunt. 80; Fuller v. Smith, 1 C. & P. 197; Ry. & M. 49.

⁹ Byles 394; Chitty 178; Lang v. Smyth, 7 Bing. 284; 5 M. & P. 78; Pereira v. Jopp, 10 B. & C. 450 n.

certain part is sustained by proof of his indorsing another part.¹

§ 240. **Presentment and Acceptance.**—Any part of a bill of exchange may be presented for acceptance.² And if there are several parts, as it is easier to avoid delay and obviate loss, the presentment should be made more promptly.³ If the first part forwarded for presentment is delayed, the second should be forwarded for that purpose.⁴

But the drawee should accept only one part.⁵ And he will be liable on the part accepted by him, although one of the other parts may have been paid.⁶ So, the acceptor is liable on all parts accepted by him and transferred by him or with his knowledge.⁷ If the second part is accepted with blanks on condition of the “first unpaid,” and the two parts are filled up differently and both discounted, the acceptor will be liable on both to *bona fide* holders.⁸ When the acceptor pays a bill, he should in all cases have the accepted part returned to him.⁹ And if it is lost, he is entitled to demand security before paying another part.¹⁰

§ 241. **Protest—Payment—Action.**—In like manner, any copy of a bill may be protested. And if the first has been sent to the indorsee and lost, and no third part can be obtained because of the drawer's absence, and a copy of the second part is protested, this will be sufficient where payment has been refused on other grounds than objection to the copy.¹¹

Payment of one part is payment of the whole bill.¹² And

¹Miller v. Hackley, Anthon 91.

²Waish v. Blatchley, 6 Wis. 413 (1853). So, in California, the presentment of one part for all is sufficient, 1872 Civ. Code § 8175.

³1 Parsons 59.

⁴Straker v. Graham, 4 M. & W. 721.

⁵Bytes 395; Chitty 178.

⁶Chitty 178; British Bills of Exchange Act (1882) § 71.

⁷Bytes 394; Chitty 178; 1 Edwards § 188; Holdsworth v. Hunter, 10 B. & C. 449.

⁸Bank of Pittsburgh v. Neal, 22 How. 96 (1859).

⁹Bytes 395.

¹⁰Chitty 178.

¹¹Dehers v. Harriot, 1 Show. 163.

¹²Benj. Chalm. Dig. Art. 29; Bytes 394; 1 Edwards § 188; 1 Parsons 59; Story on Bills § 226; British Bills of Exchange Act (1882) 71.

except where the drawee has accepted another part, he may safely pay any part that is presented to him. If the second part is paid by the acceptor after presentment of the first and protest of it for non-acceptance, and he afterwards pays the first in the hands of a *bona fide* holder, he may recover the amount paid as a payment made by mistake.¹ If two parts are both accepted and negotiated, and the proceeds received by the drawer, he will be liable on the first part, although the second part has been paid by the acceptor.²

When a bill is paid, the part which has been protested should be surrendered. So, a part which has been accepted should be surrendered; and if this is not done, the acceptor may still remain liable to a *bona fide* holder.³ When an agreement is made to surrender a bill, it implies the surrender of all the parts.⁴ After the first part of a bill has been surrendered to the drawer with demand for remittance (which amounts to extinguishing it), the holder cannot transfer the second part for the purpose of suit.⁵

When suit is brought by an indorsee against the acceptor of a bill, only the part which is accepted need be produced.⁶ But where an action is brought on the first part against the indorser, and the third part has been presented and protested for non-acceptance, it must be produced, it is said, in order to guard against the contingency of an acceptance *supra protest*.⁷ But if the indorsee bring suit against his indorser on one part, the other parts need not, in general, be produced.⁸

§ 242. **Copies.**—In England and in the United States no

¹ *Durkin v. Cranston*, 7 Johns. 442 (1811).

² *Wright v. McFall*, 8 La. An. 120 (1853).

³ *Benj. Chalm. Dig. Art. 27*; British Bills of Exchange Act (1882) § 71.

⁴ *Byles* 580; *Chitty* 178; *Kearney v. West Granada Mining Co.*, 1 H. & N. 412; 26 L. J. Ex. 15.

⁵ *Ingraham v. Gibbs*, 2 Dall. 134.

⁶ *Johnson v. Offutt*, 4 Metc. 19 (Ky. 1862); *Commercial Bank v. Routh*, 7 La. An. 128.

⁷ *Wells v. Whitehead*, 15 Wend. 527 (1806). But see, *contra*, *Kenworthy v. Hopkins*, 1 Johns. Cas. 107 (1799).

⁸ *Downes v. Church*, 13 Pet. 205 (1839).

general use is made of copies of bills of exchange. But on the continent of Europe, where a bill is not drawn in sets, copies are sometimes used for convenience of transfer, while the original is being forwarded for acceptance. And in some cases, although the practice is not a safe one, a copy without indorsement is sometimes substituted by the drawer for the original bill which has been transferred and returned to him with many indorsements on it. In such case the holder of the substituted copy may be deprived of his remedy against the acceptor by this act of the drawer.¹ We have seen, however, that a protest may sometimes be made on a copy instead of the original bill.²

§ 243. **Foreign Statutes.**—Many foreign statutes require second, third and other parts of a bill of exchange to be given on demand.³ The drawer may, in general, deliver to the payee either the first or second part, unless otherwise stipulated.⁴ If the several parts are not marked as such, each will be taken as a separate bill, and the parties on it will be liable accordingly.⁵ And in such case the drawer's only remedy is against the persons fraudulently using the several parts.⁶ Some States require each part, except the first, to state that they are invalid if presented after the first.⁷ And

¹*Ralli v. Dennistown*, 6 Exch. 483.

²*Dehers v. Harriot*, 1 Show. 163.

³*Argentine Republic* (1862 Code Com. Art. 769); *Austria* (1850 Exch. Law Art. 66); *Bolivia* (1834 Code Com. Art. 359); *Brazil* (1850 Code Com. Art. 365); *Chili* (1865 Code Com. Art. 627); *Colombia* (1853 Code Com. Art. 394); *Costa Rica* (1853 Code Com. Art. 383); *Ecuador* (1829 Code Com. as in Spain); *Germany* (1848 Exch. Law Art. 66); *Guatemala* (1774 Ordinances of Bilbao § 5); *Holland* (1838 Exch. Law Art. 104); *Honduras* (same as Guatemala 5); *Lower Canada* (1867 Civ. Code Art. 2284); *Mexico* (1854 Code Com. Art. 330); *Nicaragua* (1869 Code Com. Art. 246); *Peru* (1853 Code Com. Art. 396); *Portugal* (1833 Code Com. Art. 349); *Russia* (1862 Exch. Law Art. 554); *Salvador* (1855 Code Com. Art. 391); *Spain* (1829 Code Com. Art. 436); *Sweden* (1851 Exch. Law § 64); *Switzerland* (Exch. Laws, 1859 Berne, 1863 Basle, § 70); *Uruguay* (1865 Code Com. Art. 796); *Venezuela* (1862 Code Com. Art. 6).

⁴*Argentine Republic* (1862 Code Com. Art. 768).

⁵*Argentine Republic* (1862 Code Com. Arts. 771, 776); *Austria* (1850 Exch. Law Art. 66); *Brazil* (1850 Code Com. Art. 354); *Chili* (1865 Code Com. Art. 628); *Germany* (1848 Exch. Law Art. 66); *Hungary* (1861 Exch. Law § 21); *Uruguay* (1865 Code Com. Arts. 789, 798).

⁶*Denmark* (1825 Exch. Law § 15).

⁷*Argentine Republic* (1862 Code Com. Art. 769); *Chili* (1865 Code Com. Art. 627); *Colombia* (1853 Code Com. Art. 394); *Costa Rica* (1853 Code Com. Art.

some States require that where one part of a bill is forwarded for acceptance, it must be noted on the other parts where such part can be found.¹

If a bill is sent in several parts for acceptance beyond the sea, they must be sent by different ships; and an accident to the first ship sailing will extend the time for presenting the bill.² Every accepted part is *prima facie* an original bill in some States.³ And in some an unaccepted part cannot be paid before maturity.⁴ While in Chili it is provided that if several parts are presented after maturity, that which bears the earliest number is to be paid.⁵

Payment and possession of any part of a bill by the acceptor discharges him.⁶ But if he pays a part which has not been accepted, he will be liable afterward to the *bona fide* holder of an accepted part, and his remedy will be against the person to whom payment has been improperly made.⁷ In general, payment of one part discharges all, except as to

383); *Ecuador* (1829 Code Com. as in Spain); *Mexico* (1854 Code Com. Art. 330); *Peru* (1853 Code Com. Art. 396); *Salvador* (1855 Code Com. Art. 391); *Spain* (1829 Code Com. Art. 436); *Venezuela* (1862 Code Com. Art. 5).

¹*Austria* (1850 Exch. Law Art. 68); *Denmark* (1825 Exch. Law § 16); *Germany* (1848 Exch. Law Art. 68); *Hungary* (1861 Exch. Law § 23); *Sweden* (1851 Exch. Law § 66); *Switzerland* (Exch. Laws, 1859 Berne, 1863 Basle, § 71).

²*Costa Rica* (1853 Code Com. Art. 431); *Mexico* (1854 Code Com. Art. 378); *Nicaragua* (1869 Code Com. Art. 268); *Salvador* (1855 Code Com. Art. 439).

³*Holland* (1833 Exch. Law Art. 162); *Hungary* (1861 Exch. Law § 69); *Portugal* (1833 Code Com. Art. 383); *Sweden* (1851 Exch. Law § 65).

⁴*Colombia* (1853 Code Com. Art. 459); *Costa Rica* (1853 Code Com. Art. 452); *Ecuador* (1829 Code Com., as in Spain, 505); *Mexico* (1854 Code Com. Art. 397); *Peru* (1853 Code Com. Art. 460); *Salvador* (1855 Code Com. Art. 458); *Spain* (1829 Code Com. Art. 505).

⁵*Chili* (1865 Code Com. Art. 720).

⁶*Argentine Republic* (1862 Code Com. Art. 770); *Sweden* (1851 Exch. Law § 9); *Uruguay* (1865 Code Com. Art. 797).

⁷*Argentine Republic* (1862 Code Com. Art. 865); *Belgium* (1851 Code Napoleon); *Bolivia* (1834 Code Com. Art. 398); *Brazil* (1850 Code Com. Art. 400); *Chili* (1865 Code Com. Art. 719); *Colombia* (1853 Code Com. Art. 457); *Costa Rica* (1853 Code Com. Art. 450); *Ecuador* (1829 Code Com. as in Spain); *France* (1807 Code Napoleon Art. 148); *Greece* (1835 Code Napoleon); *Hayti* (1826 Code Napoleon); *Holland* (1833 Exch. Law Art. 161); *Italy* (1865 Code Com. Art. 233); *Lower Canada* (1857 Civ. Code Art. 2315); *Mexico* (1854 Code Com. Art. 395); *Nicaragua* (1869 Code Com. Art. 279); *Peru* (1853 Code Com. Art. 458); *Portugal* (1833 Code Com. Art. 382); *Russia* (1862 Exch. Law Art. 626); *Salvador* (1855 Code Com. Art. 456); *San Domingo* (1829 Code Napoleon); *Switzerland* (Geneva, Code Napoleon); *Spain* (1829 Code Com. Art. 503); *Turkey* (Code Napoleon 105); *Uruguay* (1865 Code Com. Art. 883); *Venezuela* (1862 Code Com. Art. 64).

the indorsers and acceptors who have indorsed or accepted other parts.¹ But it is sufficient, if the payment of one part shows on its face that the others are satisfied thereby.² The holder, who demands payment from the acceptor of an unaccepted part, is entitled to receive it on giving security.³ And in like manner, he may receive payment on loss of the original bill without producing the other parts, on proving his property and giving security.⁴ And if, after offering security, payment is refused, the bill should be protested and demand of a duplicate bill made upon the indorser.⁵

In Russia there are special provisions for obtaining posses-

¹*Austria* (1850 Exch. Law Art. 67); *Germany* (1848 Exch. Law Art. 67); *Switzerland* (Exch. Laws, 1859 Berne, 1863 Basle, § 73); *Uruguay* (1865 Code Com. Art. 798).

²*Argentine Republic* (1862 Code Com. Art. 864); *Belgium* (1851 Code Napoleon 147); *France* (1807 Code Napoleon Art. 147); *Greece* (1835 Code Napoleon); *Hayti* (1826 Code Napoleon 144); *Holland* (1838 Exch. Law Art. 160); *Italy* (1865 Code Com. Art. 232); *Portugal* (1833 Code Com. Art. 381); *San Domingo* (1829 Code Napoleon); *Switzerland* (Geneva, Code Napoleon); *Turkey* (Code Napoleon 104); *Uruguay* (1865 Code Com. Art. 882); *Venezuela* (1862 Code Com. Arts. 5, 63).

³*Belgium* (1851 Code Napoleon); *Bolivia* (1834 Code Com. Art. 399); *Colombia* (1853 Code Com. Art. 458); *Costa Rica* (1853 Code Com. Art. 451); *Denmark* (1825 Exch. Law §§ 61, 62); *Ecuador* (1829 Code Com. as in Spain); *France* (1807 Code Napoleon Arts. 150-1); *Greece* (1835 Code Napoleon); *Guatemala* (1774 Ordinances of Bilbao § 27); *Hayti* (1826 Code Napoleon); *Hungary* (1861 Exch. Laws §§ 120, 121); *Italy* (1865 Code Com. Arts. 236-7); *Mexico* (1854 Code Com. Art. 396); *Nicaragua* (1869 Code Com. Art. 280); *Peru* (1853 Code Com. Art. 459); *Salvador* (1855 Code Com. Art. 457); *San Domingo* (1829 Code Napoleon); *Spain* (1829 Code Com. Art. 504); *Geneva* (Code Napoleon 150-1); *Turkey* (Code Napoleon 107-8); *Uruguay* (1865 Code Com. Arts. 900-904); *Venezuela* (1862 Code Com. Arts. 66-70).

⁴*Argentine Republic* (1862 Code Com. Art. 883-885); *Austria* (1850 Exch. Law Art. 73-74); *Belgium* (1851 Code Napoleon); *France* (1807 Code Napoleon Art. 152); *Germany* (1848 Exch. Law Art. 73-74); *Greece* (1835 Code Napoleon); *Hayti* (1826 Code Napoleon 149); *Italy* (1865 Code Com. Art. 238); *Lower Canada* (1867 Civ. Code Art. 2316); *Nicaragua* (1869 Code Com. Art. 282-3); *Peru* (1853 Code Com. Art. 466); *Portugal* (1833 Code Com. Art. 384); *Salvador* (1855 Code Com. Art. 461); *San Domingo* (1829 Code Napoleon); *Sweden* (1851 Exch. Law § 70-71); *Switzerland* (Exch. Laws, 1859 Berne, 1863 Basle, § 77-79); *Geneva* (Code Napoleon 152); *Turkey* (Code Napoleon 109); *Venezuela* (1862 Code Com. Art. 66-70).

⁵*Argentine Republic* (1862 Code Com. Art. 885-887); *Belgium* (1851 Code Napoleon 153-4); *Colombia* (1853 Code Com. Art. 461-4); *Costa Rica* (1853 Code Com. Art. 454-7); *Ecuador* (1829 Code Com. as in Spain); *France* (1807 Code Napoleon Art. 153-4); *Greece* (1835 Code Napoleon); *Hayti* (1826 Code Napoleon 150-1); *Italy* (1865 Code Com. Art. 239-240); *Mexico* (1854 Code Com. Art. 399-402); *Nicaragua* (1869 Code Com. Art. 280-4); *Peru* (1853 Code Com. Art. 467); *Salvador* (1855 Code Com. Art. 460-463); *San Domingo* (1829 Code Napoleon); *Spain* (1829 Code Com. Art. 507-510); *Geneva* (Code Napoleon 153-4); *Turkey* (Code Napoleon 110-111); *Uruguay* (1865 Code Com. Art. 900-904); *Venezuela* (1862 Code Com. Art. 66-70).

sion and payment of a bill, where the holder has never had the original in his possession but has only a copy.¹ And many foreign statutes provide for the giving and indorsing of copies in lieu of the original.² Some statutes require that it be noted on the copy where the copy ends and the original indorsements begin.³ And in some countries payment cannot be made at all on a copy without production of at least one of the original parts.⁴

¹*Russia* (1862 Exch. Law Art. 583-4); *Sweden* (1851 Exch. Law §§ 67, 69); *Switzerland* (Exch. Laws, 1859 Berne, 1863 Basle, § 71-2).

²*Argentine Republic* (1862 Code Com. Art. 772); *Austria* (1850 Exch. Law Art. 70-72); *Bolivia* (1834 Code Com. Art. 360); *Brazil* (1850 Code Com. Art.); *Chili* (1865 Code Com. Art. 629); *Colombia* (1853 Code Com. Art. 395); *Costa Rica* (1853 Code Com. Art. 384); *Ecuador* (1829 Code Com., as in Spain); *Germany* (1848 Exch. Law Arts. 70-72, 74-76); *Mexico* (1854 Code Com. Art. 331); *Nicaragua* (1869 Code Com. Art. 247); *Peru* (1853 Code Com. Art. 397); *Salvador* (1855 Code Com. Art. 392); *Spain* (1829 Code Com. Art. 437); *Switzerland* (Exch. Laws, 1859 Berne, 1863 Basle, § 74-76); *Uruguay* (1865 Code Com. Art. 799); *Venezuela* (1862 Code Com. Art. 6).

³*Hungary* (1861 Exch. Law § 24); *Sweden* (1851 Exch. Law § 68).

⁴*Bolivia* (1834 Code Com. Art. 397); *Chili* (1865 Code Com. Art. 720); *Colombia* (1853 Code Com. Art. 460); *Costa Rica* (1853 Code Com. Art. 453); *Ecuador* (1829 Code Com., as in Spain); *Mexico* (1854 Code Com. Art. 398); *Nicaragua* (1869 Code Com. Art. 281); *Peru* (1853 Code Com. Art. 461); *Salvador* (1855 Code Com. Art. 459); *Spain* (1829 Code Com. Art. 506).

CHAPTER VIII.

CAPACITY

- I. *Civil Restrictions.*
- II. *Alien Enemies.*
- III. *Idiots and Lunatics.*
- IV. *Drunkards.*
- V. *Infants.*

I. CIVIL RESTRICTIONS.

- 244. General Principles.
- 245. Civil Restrictions—Merchants.
- 246. Clergy—Soldiers—Farmers.
- 247. Felons—Bankrupts.

§ 244. **General Principles.**—In general all persons who can make a legal contract can become parties to commercial paper. Want of capacity may be either *natural*, *legal* or *political*, according as it proceeds from mental unfitness or from the requirements of local or public law. *Naturally* incapable are idiots, lunatics and all persons of unsound or insufficient understanding. *Legally* incapable are infants, married women and corporations, so far as their power is restricted by law. And these laws are, in some degree, based on presumptions of natural incapacity. *Politically* incapable are alien enemies and, to a certain extent, public officers and State and municipal governments.

It is to be observed at the outset that the making of a note or the drawing of a bill of exchange is an admission of the payee's capacity to receive it.¹ So, the drawing of a bill of exchange admits the payee's capacity *at that time* to indorse it.² And in like manner an acceptor admits, and is estopped

¹ *Esley v. People*, 23 Kans. 510 (1880), where the note was made to a State. So, as to a corporation payee's existence, *Goodrich v. Reynolds*, 31 Ill. 490 (1863); especially at suit of a *bona fide* holder for value, *Camp v. Byrne*, 41 Mo. 525 (1867); *Nashua F. I. Co. v. Moore*, 55 N. H. 48 (1874); and notwithstanding a general prohibition against doing business as a foreign corporation, *Shook v. Singer S. M. Co.*, 61 Ind. 520 (1878).

² *Collis v. Emmet*, 1 H. Bl. 313; *Drayton v. Dale*, 2 B. & C. 293 (1823); *Phillips v. Im Thurn*, 18 C. B. (s. s.) 694 (1865); *Brown v. Donnell*, 49 Me.

from denying, as against a *bona fide* purchaser of the accepted bill, the drawer's capacity *at that time* to bind himself as drawer.¹ So, an indorser cannot question the capacity of a subsequent, though not immediate, indorsee to acquire a note or bill.²

The questions of *capacity* and *authority* of parties to make, accept and transfer negotiable paper are governed by substantially the same rules of law that control other contracts.

§ 245. **Former Restrictions—Merchants.**—No restrictions upon the capacity of a person to enter into a mercantile contract by reason of the character of his trade or occupation now exist in the United States, although it was once thought that none but merchants were capable of binding themselves by a contract under mercantile law. The mercantile character of a party to commercial paper is now of no importance either in this country or in England.³ And in these countries all persons, who are *sui juris* and have capacity and understanding sufficient for a valid contract, are competent to become parties to a bill of exchange, note or check.⁴

By foreign laws, however, distinctions were formerly made, and in some cases still exist, in favor of merchants and to the exclusion of clergymen and other professional men, sol-

421 (1860); *Nightingale v. Withington*, 15 Mass. 272 (1818). And this is true where the payee is known by the maker to be fictitious, *Lane v. Krekle*, 22 Iowa 399 (1867). But the insanity of the payee and indorser may be set up in defense by the maker, *Burke v. Allen*, 29 N. H. 106 (1854); *Peaslee v. Robbins*, 3 Metc. 164 (1841).

¹*Cooper v. Meyer*, 10 B. & C. 468 (1830). So held as to a married woman's capacity, *Smith v. Marsack*, 18 L. J. C. P. 65 (1848), and that of a bankrupt, *Braithwaite v. Gardiner*, 8 Q. B. 473 (1846); and that of a corporation, *Halifax v. Lyle*, 3 Exch. 464 (1849).

²*National Pemberton Bank v. Porter*, 125 Mass. 333 (1878).

³*Chitty* 20; *Story on Bills* § 71; *Story on Prom. Notes* § 61; *Bromwich v. Loyd*, Lutw. 1585 (1697). In *Fairley v. Roch*, Lutw. 891 (1687), it was held on demurrer that an allegation of a custom of merchants as to bills of exchange applicable to "any merchant or other person" was too general, but in *Bromwich v. Loyd*, *supra*, it was said by Treby, C. J., that no allegation of custom was necessary and that the law of mercantile bills of exchange "at first extended only to merchants, strangers trading with English merchants, and afterwards to inland bills between merchants trading one with another in England, and after that to all traders and dealers, and of late to all persons trading or not."

⁴*Chitty* 20; *Sarsfield v. Witherly*, 2 Vent. 295; *Hodges v. Steward*, 12 Mod. 86; 8 S. C., 1 Salk. 125.

diers and other enumerated classes of the inhabitants. Thus, in Germany a person not otherwise capable of making a legal contract may, as a *merchant*, possess the power to contract and even to become a party to commercial paper; and all commercial paper is presumed to be made in a mercantile transaction, unless the contrary be expressed on its face.¹ In Spain and in some of the Spanish-American States, bills and notes by persons who are not merchants have no mercantile character, and amount only to certificates of indebtedness, and are subject only to ordinary courts and procedure. An exception is made, however, as to drawer and acceptor, but not indorser, where the consideration is shown to have been a mercantile transaction.² The like rule and exception prevail in Bolivia, saving, however, the holder's rights against other parties who are merchants and remain liable according to mercantile law.³ In Hungary the power of drawing bills of exchange is conferred on merchants, manufacturers and mechanics of full age and registered as such in the commercial court. Bills drawn by other citizens and on them are not commercial paper.⁴ In Denmark and in Switzerland all persons who are of full age and competent to acknowledge a debt, can draw, accept and indorse bills. And where any incapacity exists in one party to commercial paper, it does not affect the liability of other parties.⁵ In Chili all persons capable of making a legal contract are capable of drawing or accepting a bill of exchange.⁶

§ 246. **Clergy—Soldiers—Farmers.**—By Statute of 57

¹Thöl's Wechselrecht 118, 119. But in Prussia, although an infant is capable of making a mercantile contract, his bill of exchange requires the approval of the court, *Ib.* By the German Exchange Law (Art. 1) all persons who are capable of making a contract can draw or accept a bill of exchange.

²*Spain* (1829 Code Com. Art. 434); *Colombia* (1853 Code Com. Art. 392); *Costa Rica* (1853 Code Com. Art. 381); *Ecuador* (1829 Code Com. Art. 434); *Peru* (1853 Code Com. Art. 391); *Salvador* (1855 Code Com. Art. 389).

³*Bolivia* (1834 Code Com. Art. 367).

⁴*Hungary* (1861 Exch. Law Art. 10). All persons, however, capable of acquiring any right can acquire right to a bill of exchange (*Ib.* Art. 7).

⁵*Denmark* (1825 Exch. Law Art. 4); *Switzerland* (Basle, 1863 Exch. Law Arts. 1, 2; Berne, 1859 Exch. Law Arts. 1, 2).

⁶*Chili* (1865 Code Com. Art. 622).

Geo. III. c. 99, spiritual persons are forbidden to trade. And it has been held under this act that a joint stock company, in which was a beneficed clergyman, could not bring an action as indorsee of a bill of exchange.¹ The Russian law declares all religious persons incompetent;² the Hungarian law, all clergymen of any religion and all members of religious orders.³ In Hungary, too, all persons in active military service are incapable of drawing a bill of exchange.⁴ So, in Servia, all soldiers and military garrisons under the rank of sub-lieutenant, their bills of exchange having force only as acknowledgments of debt.⁵ So, in Russia, all soldiers in the lower military grades.⁶

In Servia, too, farmers cannot draw or accept a bill of exchange.⁷ So, in Russia, farmers who do not own land and have no trading license.⁸

§ 247. **Felons—Bankrupts.**—In England an attainted felon cannot take a bill or note by indorsement.⁹ Nor can a bankrupt before receiving his discharge, although it might be held otherwise after a long lapse of years.¹⁰ But if a bill of exchange has been transferred by a bankrupt before petition filed, his indorsement afterward will be lawful to make the transfer perfect.¹¹ And in such case his assignee may be directed by the court to complete the transfer by an indorsement without recourse.¹²

Under the U. S. Bankrupt Act of 1867, it has been held that a check, drawn before an assignment in bankruptcy, but

¹ *Hall v. Franklin*, 3 M. & W. 259; now remedied by 1 and 2 Vict. c. 10.

² *Russia* (1862 Exch. Law Art. 546).

³ *Hungary* (1861 Exch. Law Art. 11).

⁴ *Hungary* (1861 Exch. Law Art. 11).

⁵ *Servia* (1860 Code Com. Arts. 76, 77, 78).

⁶ *Russia* (1862 Exch. Law Art. 546).

⁷ *Servia* (1860 Code Com. Arts. 76, 77, 78).

⁸ *Russia* (1862 Exch. Law Art. 546).

⁹ *Bullock v. Dodds*, 2 B. & Ald. 258.

¹⁰ *Pitt v. Chappelow*, 8 M. & W. 616 (1841).

¹¹ *Smith v. Pickering*, Peake 50 (1791); *Hersey v. Elliot*, 67 Me. 526 (1878).

¹² *Ex parte Mowbray*, 1 Jac. & W. 428 (1820).

not presented until afterward, will not transfer the fund.¹ But a bankrupt may draw on his own check money deposited in bank after petition in bankruptcy filed.² So, the pledgee of a bond may sell it notwithstanding the bankruptcy of the pledgor.³ The effect of bankruptcy as a transfer of commercial paper, or by way of defense other than for want of original capacity on that ground, will be considered in a later part of this work. The U. S. Bankrupt Acts have given rise to few questions relating to the capacity of a party to make commercial paper. As regards his power to transfer such paper, it is rather a question of property left in him than of capacity.

¹First Nat. Bank *v.* Gish, 72 Penna. St. 13 (1872).

²Mays *v.* Manufacturers' Nat. Bank, 64 Penna. St. 74 (1870).

³Jerome *v.* McCarter, 4 Otto 734 (1876).

II. ALIEN ENEMIES.

- 248. Who are Alien Enemies.
- 249. Principles Applied to American Civil War.
- 250. Contracts between Alien Enemies—Insurance.
- 251. Agency—Partnership.
- 252. Contracts when Valid.
- 253. Commercial Paper.
- 254. Drawee an Alien Enemy.
- 255. Payee or Indorsee an Alien Enemy.

§ 248. **Who are Alien Enemies.**—It has been said that for political reasons alien enemies are incapable of becoming parties to commercial paper. And this incapacity extends for the protection of the State to all contracts between citizens of the State and their alien enemies pending the continuance of a war. “Every resident of a hostile place or country, even though a subject, is regarded as an alien enemy.”¹ This applies indiscriminately to all persons within the belligerent lines, excepting, of course, such as are actually there in the service of their own government in a military capacity or otherwise.² Thus, a naturalized citizen of the United States domiciled in England, is an alien enemy as to American citizens during war with England;³ although immediately upon his departure for this country he would cease to be so.⁴ In like manner, a British subject, who is a naturalized citizen of a neutral State, is to be regarded in England as an alien enemy while voluntarily residing in the enemy’s country.⁵ But a note made by a British subject to the citizen of a neutral State residing in an enemy’s country may be sued upon in the English courts.⁶ And the subject of a neutral State taken prisoner on an enemy’s vessel and

¹ Wharton’s Conflict of Laws § 737a.

² *Hennen v. Gilman*, 20 La. An. 240 (1868).

³ *The Francis*, 1 Gall. 614 (1813), Story, J., saying in this case: “For all commercial purposes it is quite immaterial which is the native or adopted country of a party. He is deemed a merchant of the country where he resides and carries on trade.”

⁴ *The Indian Chief*, 3 C. Rob. 12 (1800).

⁵ *O’Mealey v. Wilson*, 1 Campb. 482 (1808).

⁶ *Houriet v. Morris*, 3 Campb. 303 (1812).

brought to England is no longer to be regarded as an alien enemy, but may contract and sue like other citizens in England.¹ A foreign corporation is an alien enemy under the same circumstances as an individual.² As a person takes his character of enemy or neutral in general from the place where he is found, it follows that a British citizen domiciled in a neutral country may lawfully trade in that country with the citizens of another country at war with Great Britain.³

§ 249. **Principles Applied to American Civil War.**—The principles relating to alien enemies apply to their full extent to the civil war in the United States, as regarded citizens of the two belligerent sections.⁴ The beginning and end of the war have been judicially determined by the courts in various parts of the country. Thus, it has been held that the war ended east of the Mississippi river, upon the President's proclamation of June 13th, 1865;⁵ and in South Carolina, that the war extended from the 19th day of April, 1861, to April 1st, 1866.⁶ Citizens of seceded States were, however, not alien enemies before the secession of their States.⁷ In Texas it has been held that intercourse between its citizens and those of the State of Illinois was lawful until the pas-

¹*Sparenburgh v. Bannatyne*, 1 Bos. & P. 163; *Rex v. Desperado*, 1 Taunt. 28.

²*Society for Propagation of the Gospel v. Wheeler*, 1 Gall. 132 (1814). In time of peace, however, a foreign corporation, like any other foreign citizen, may make and enforce contracts in other States, unless excluded by the statutes or policy of such State, *Williams v. Creswell*, 51 Miss. 817 (1876). So, a promissory note made by an Indian is valid, *Rubidaux v. Vallie*, 12 Kans. 28 (1873).

³*Chitty* 19; *Bell v. Reid*, 1 M. & S. 726.

⁴*Montgomery v. United States*, 15 Wall. 395; *Prize Cases*, 2 Black 667 (1862); *Shortridge v. Macon*, Chase Dec. 136; *Hennen v. Gilman*, 20 La. An. 240 (1868); *Bonneau v. Dinsmore*, 23 How. Pr. 397 (1861); *Sanderson v. Morgan*, 25 *Ib.* 141 (1863); S. C., 39 N. Y. 231; *McStea v. Matthews*, 3 Daly 349 (1871); *Philips v. Hatch*, 1 Dill. 571 (1871); *Ensley v. United States*, 6 Ct. Claims 282 (1870); *Cutner v. United States*, *Ib.* 415; *Brown v. Hiatt*, 1 Dill. 381; *Lacy v. Sugarman*, 12 Heisk. 354 (1873). In the words of Grier, J., in the *Prize Cases*, 2 Black 667, "it is not necessary to constitute war that both parties should be acknowledged as independent nations or sovereign States. A war may exist where one of the belligerents claims sovereign rights as against the other."

⁵*Semmes v. City Ins. Co.* 36 Conn. 543 (1869).

⁶*Gooding v. Varn*, Chase Dec. 286.

⁷*United States v. Boxes of Arms*, 1 Bond 446 (1861).

sage of the Act of Congress of July, 1861.¹ And in Greenbrier county, Virginia, which was excepted from the operation of this Act, a sale of personal property at a later period to a *bona fide* purchaser was held to be valid.²

A note is not presumed to have been made between alien enemies because secured by a mortgage dated six months later, which showed the parties to be then resident in different belligerent sections.³ But a citizen of Savannah or Memphis, after such city had been brought within the Federal lines, was the alien enemy of a citizen of Alabama, although intercourse between the cities referred to and the rest of the United States had been prohibited by the President's proclamation of April, 1863.⁴ On the other hand, it has been held in a case regarding the Statute of Limitations that a citizen of New Orleans was an alien enemy, even when the city was occupied by United States troops.⁵ But a contract made between a British subject domiciled in New Orleans and a loyal citizen of the United States residing there, but acting as agent for an alien enemy, has been held to be void.⁶ This has also been held to be the case with a contract between a Danish subject domiciled in New York and an alien enemy who was temporarily there, but resided in Texas.⁷

§ 250. **Contracts between Alien Enemies—Insurance.**—It is a general rule that all contracts between alien enemies during war are void.⁸ But existing and continuing contracts

¹McCormick v. Arnspiger, 38 Tex. 569 (1873).

²Hawver v. Seibert, 4 W. Va. 586 (1871).

³Hyatt v. James, 2 Bush 463 (1867).

⁴Ensley v. United States, 6 Ct. Claims 282 (1870); Cutner v. United States, *Id.* 415; Lacy v. Sugarman, 12 Heisk. 354 (1873). And see U. S. Stat. July 2d, 1864, § 4.

⁵Perkins v. Rogers, 35 Ind. 124 (1871).

⁶Montgomery v. United States, 15 Wall. 395.

⁷Habricht v. Alexander, 1 Woods 413 (1871).

⁸Byles 70; Chitty 18; 1 Daniel 221; 1 Edwards § 44; 1 Parsons 151; Story on Bills § 99; Story on Prom. Notes § 94; Wheaton's Internat. Law 392; Wharton's Conflict of Laws § 497; Willison v. Patteson, 7 Taunt. 439; Gist v. Mason, 1 T. R. 84 (1786); Potts v. Bell, 8 *Id.* 548; Furtado v. Rogers, 3 Bos. & P. 191; The Indian Chief, 3 C. Rob. 12 (1800); The Rapid, 8 Cranch 155 (1814); Scholefield v. Eichelberger, 7 Pet. 586 (1833); Griswold v. Waddington, 16 Johns. 438 (1819), affirming 15 *Id.* 57; The Reform, 3 Wall. 617;

are suspended and not annulled by war.¹ If goods are delivered after the war has come to an end, upon a sale made during the war, this is a war contract and void as such, and no action lies for the goods.²

On the other hand, a contract of insurance is not annulled but merely suspended by the war.³ So, if insurance premiums are not paid during the war, payment made and accepted after it is ended will revive the contract of insurance.⁴ But where the payment of the premium is made a condition precedent in the policy, its non-payment will work a forfeiture although made unavoidable by the outbreak of the war.⁵ And in such case the tender of the unpaid premium after the close of the war will not revive the policy.⁶ If, however, the premiums were tendered during the war to a local agent residing in the same country, the policy will not be forfeited and recovery may be had upon the death of the person insured during the war.⁷

§ 251. **Agency—Partnership.**—All contracts of agency having for their object the protection of property or collection of money, and not involving communication through the enemy's lines, remain valid and unrevoked by war. This is

United States *v.* Grossmeyer, 9 Wall. 72; Crawford *v.* Penn, 3 Wash. C. C. 484 (1819); Noblom *v.* Milbourn, 21 La. An. 641 (1869); Graham *v.* Merrill, 5 Coldw. 622 (1868).

¹ Daniel 225; 1 Edwards § 44; Story on Bills § 99; Story on Prom. Notes § 116; Hanger *v.* Abbott, 6 Wall. 540 (1867).

² Scholefield *v.* Eichelberger, 7 Pet. 586 (1833).

³ Connecticut Life Ins. *v.* Duerson, 28 Gratt. 630 (1877).

⁴ Cohen *v.* N. Y. Life Ins. Co., 50 N. Y. 610; Hamilton *v.* Mutual Life Ins. Co., 9 Blatchf. 234.

⁵ Manhattan Life Ins. Co. *v.* Buck, 3 Otto 24; N. Y. Life Ins. Co. *v.* Statham, 3 Otto 24 (1876), Bradley, J., saying in this case, "The doctrine of the revival of contracts suspended during the war is one based on considerations of equity and justice, and cannot be invoked to revive a contract which it would be unjust or inequitable to revive." But see, *contra*, Hilliard *v.* Mutual Benefit Ins. Co., 8 Vroom 444 (1874), affirming 6 *Ib.* 415; Semmes *v.* City Ins. Co., 6 Blatchf. 445; S. C., 36 Conn. 551.

⁶ O'Reilly *v.* Mutual Life Ins. Co., 2 Abb. Pr. (N. S.) 167 (1866); Dillard *v.* Manhattan Life Ins. Co., 44 Ga. 119.

⁷ Manhattan Life Ins. Co. *v.* Warwick, 20 Gratt. 614; N. Y. Life Ins. Co. *v.* Clopton, 7 Bush 179; Statham *v.* New York Life Ins. Co., 45 Miss. 581; Sands *v.* N. Y. Life Ins. Co., 50 N. Y. 626.

true of agencies to collect money,¹ to protect the principal's property,² or to receive payment on account of a former debt; but not to make fresh purchases.³

Where the debtor is an alien enemy and the creditor is a citizen, the creditor's rights will not be made to suffer by the absence or legal incapacity of the debtor. Thus, it has been held that lands mortgaged in Illinois, with a power of sale, by one who afterwards becomes a resident in the Confederate States, may be lawfully sold during the war and notwithstanding the fact that the debtor has become an alien enemy.⁴ Other courts, however, have held that a power of attorney for the sale of land is revoked by war.⁵ Lawful payment of a debt may be made to a resident and friendly agent of an alien enemy.⁶ And delivery of goods after the end of the war may be lawfully made under an agency created and contract executed before the war.⁷ But an agency cannot be created after the outbreak of a war.⁸

The relation of partners, like that of principal and agent, is dissolved by war. And when such partners have become alien enemies, the contract of one is no longer binding upon the firm.⁹ Nor can a partner who is an alien enemy indorse a note belonging to the firm, so as to transfer the interest of

¹ *Maloney v. Stephens*, 11 Heisk. 738 (1872); *Hale v. Wall*, 22 Gratt. 424 (1872); *Fisher v. Kintz*, 9 Kans. 501 (1872). And all agencies between citizens of slave-holding States were expressly saved in Tennessee by the act of 1861.

² *Buford v. Speed*, 11 Bush 338 (1875).

³ *United States v. Lapéne*, 17 Wall. 601 (1873).

⁴ *University v. Finch*, 18 Wall. 106 (1873); *Willard v. Boggs*, 56 Ill. 163 (1870); *Harper v. Ely*, *Ib.* 179; *De Jarnette v. De Giverville*, 56 Mo. 440 (1874).

⁵ *Conley v. Burson*, 1 Heisk. 145 (1870). And see *Howell v. Gordon*, 40 Ga. 302 (1869). But where a sale of land was made under such a power, an action was allowed after the war to recover the purchase-money from the purchaser, *King v. Hanson*, 4 Call 259 (1790).

⁶ *Sands v. N. Y. Life Ins. Co.*, 59 Barb. 556 (1871); *Robinson v. Internat. Ins. Co.*, 42 N. Y. 54 (1870); *Stoddart v. United States*, 6 Ct. Claims 340 (1870); *Berubeimer v. United States*, 5 *Ib.* 549. But see, *contra*, *Blackwell v. Willard*, 65 N. C. 555 (1871), where the payment was made in settlement of a suit pending at the outbreak of the war.

⁷ *Buchanan v. Curry*, 19 Johns. 137 (1821).

⁸ *Cramer v. United States*, 6 Ct. Claims 381; *S. C.*, 7 *Ib.* 302.

⁹ *Griswold v. Waddington*, 16 Johns. 438 (1819), affirming 15 *Ib.* 57; *Woods v. Wilder*, 43 N. Y. 164 (1870).

his former partner.¹ Where, however, partners who have made a firm note before the outbreak of war afterwards become alien enemies, their individual liability as makers will not be affected.² And it has been held that a partner in New York will be bound by the acceptance of a bill of exchange by his partner in the Confederate States prior to the Act of Congress of July, 1861.³

§ 252. **Contracts between Alien Enemies—When Valid.**—There are some exceptions to the rule making void contracts between alien enemies, these exceptions being made for the necessary protection by every State of its own citizen. Thus, contracts by a prisoner-of-war for necessities, though made with an alien enemy, are lawful.⁴ So, a note given in payment for a license, to protect a ship against capture by the enemy, is valid.⁵ And an enemy's license of this sort will not render void a ship's policy of insurance.⁶ Moreover, contracts between alien enemies may be permitted by special license of the government. But such license must be proved by the party alleging it.⁷

§ 253. **Commercial Paper.**—The principle making void contracts between alien enemies applies with full force to commercial paper.⁸ And the exceptions above referred to are also applicable to it. Thus, a bill of exchange given to an alien enemy for the ransom of a captured ship, is valid.⁹ So, too, if given for repairs made to a ship in the

¹ *Bank of New Orleans v. Matthews*, 49 N. Y. 12 (1872).

² *Booker v. Kirkpatrick*, 26 Gratt. 145 (1875).

³ *McStea v. Matthews*, 3 Daly 349 (1871); affirmed 50 N. Y. 166 (1872); *Matthews v. McStea*, 1 Otto 7 (1875).

⁴ 1 Parsons 152; Story on Bills § 101; Story on Prom. Notes § 96.

⁵ *Coolidge v. Ingler*, 13 Mass. 26.

⁶ *Hayward v. Blake*, 12 Mass. 176.

⁷ *Lacy v. Sugarman*, 12 Heisk. 354 (1873); *In re Ouachita Cotton*, 6 Wall. 531.

⁸ 1 Daniel 222; 1 Edwards § 44; 1 Parsons 151; Story on Bills § 100; Story on Prom. Notes § 95; Wheat. Internat. Law 392; *Woods v. Wilder*, 43 N. Y. 164 (1870); *Philips v. Hatch*, 1 Dill. 571 (1871); *McVeigh v. Bank of the Old Dominion*, 26 Gratt. 785 (1875).

⁹ *Ricord v. Bettenham*, 3 Burr. 1734. Much more a bill of exchange for such consideration given to an alien friend, *Maisonnaire v. Keating*, 2 Gall. 325.

enemy's country under protection of a cartel.¹ But a bill of exchange drawn by a British prisoner, in France, upon a British subject and made payable to an alien enemy, is void, in England, by statute.²

§ 254. **Drawee an Alien Enemy.**—This has been held to be the case also with a bill of exchange drawn by a citizen of the State of Georgia, on a citizen of the State of New York, after the outbreak of the war;³ or by a citizen of Mobile, while it was in the Confederate lines, on a citizen of New Orleans, while it was in the control of the United States troops, intercourse between the two being then prohibited.⁴ Such paper, however, has been held to be valid in the hands of a *bona fide* holder for value.⁵ So, too, if transferred to the United States government.⁶ And where such a bill is invalid, it has been held that a payee, who took it in ignorance of the capture of New Orleans and of its possession by Federal troops, might recover all payments made by him for it.⁷

§ 255. **Payee or Indorsee an Alien Enemy.**—In like manner, a bill of exchange is void if the drawer and drawee are both citizens of the United States and the payee is an enemy;⁸ or if the drawer and payee are alien enemies and the drawee a citizen of the United States.⁹ But if the bill is drawn by a citizen of the United States, on an alien enemy, in favor of another alien enemy, and is delivered by the drawer to another citizen of the United States, on an agreement that he will pay the drawer whatever sum of money is paid by the drawee to the payee, this agreement will

¹Suckley v. Furse, 15 Johns. 338 (1818).

²34 Geo. III. c. 9 § 2.

³Woods v. Wilder, 43 N. Y. 164 (1870).

⁴Tarleton v. Southern Bank of Ala., 49 Ala. 229 (1873).

⁵Lacy v. Sugarman, 12 Heisk. 354 (1873).

⁶United States v. Barker, 1 Paine 156 (1820).

⁷Williams v. Mobile Savings Bank, 2 Woods 501 (1875).

⁸Craft v. United States, 12 Ct. Cl. 178 (1876).

⁹Moore v. Foster, Chase Dec. 222 (1868); Billgerry v. Branch, 19 Gratt. 393 (1869); Tarleton v. Southern Bank, 49 Ala. 229 (1873). And payment by such a bill is no payment unless accepted as such, Moore v. Foster, *supra*.

be valid, as it involves no transfer of funds to the enemy's country.¹

The indorsement of a note in the enemy's country and its delivery to a messenger to deliver in this country, during the war, to one of our own citizens, is illegal.² So, a bill drawn in France by an alien enemy residing then in France, upon a British subject residing in England, and indorsed to a British subject residing in France, is illegal.³

But the transfer of a note in this country is valid, although the maker may be an alien enemy and the note itself in the hands of the enemy's government.⁴ And an indorsee in the United States may sue his indorser here upon an indorsement made here of a certificate of deposit made in the enemy's country between alien enemies, and void on that account.⁵ And it has been held that an indorsement to an alien enemy by a British subject residing in France, who is the payee of a bill of exchange drawn there by a British prisoner upon a British subject in England, will be valid in England.⁶

Although a note between alien enemies is void, a subsequent promise to pay it may be valid.⁷ This is true, although payment of such instrument during the war be expressly forbidden by statute.⁸ In like manner, a note may be lawfully given after the end of the war in payment of a debt created during the war.⁹ And it should be in all cases remembered that the legality of a payment made to an alien enemy and received by him, cannot be questioned by himself.¹⁰

¹ *Haggard v. Conkwright*, 7 Bush 16 (1869).

² *Russell v. Russell*, 1 MacArth. 263 (1874).

³ *Willison v. Patteson*, 7 Taunt. 439 (1817).

⁴ *Morris v. Poillon*, 50 Ala. 403 (1873).

⁵ *Morrison v. Lovell*, 4 W. Va. 346 (1870).

⁶ *Antoine v. Morshead*, 6 Taunt. 237; S. C., 1 Marsh. 558; *Daubuz v. Morshead*, 6 Taunt. 332.

⁷ *Ledoux v. Buhler*, 21 La. An. 130 (1869).

⁸ *Duhamel v. Pickering*, 2 Stark. 90.

⁹ *Borland v. Sharp*, 1 Root 178 (1790).

¹⁰ *Rogers v. Gibbs*, 25 La. An. 563 (1873).

III. IDIOTS AND LUNATICS.

256. Lunatic's Contracts—Voidable or Void.

257. Defense Admissible, when.

258. What Amounts to Lunacy.

259. Pleading—Evidence.

260. Inquisition—How far Conclusive.

§ 256. **Lunatic's Contracts—Voidable or Void.**—All persons of unsound mind—idiots, lunatics and imbeciles—are by nature incapable of entering into any contract, commercial or otherwise, requiring mental understanding and consent. The law throws its protection over all such persons by declaring their contracts void.¹ A deed by such a person is absolutely void,² especially where it is merely voluntary.³ So, an implied authority to an agent to give or surrender a note is revoked by the principal's lunacy.⁴ In general, however, it is more correct to say that a lunatic's contract is *voidable*.⁵ It may be avoided by the personal representative of the lunatic, or by his guardian, or by a subsequent grantee of the property which the lunatic has conveyed.⁶ But it cannot be avoided by the other party to the contract.⁷

¹ Byles 63; 1 Daniel 215; Story on Prom. Notes § 101; *Sentance v. Poole*, 3 C. & P. 1 (1827); *Baxter v. Lord Portsmouth*, 2 *Ib.* 178; S. C., 5 B. & C. 170.

² *Van Deusen v. Sweet*, 51 N. Y. 378 (1873). And the property conveyed may be recovered, *Alston v. Boyd*, 6 Humph. 504 (1846). So, too, in an action brought for that purpose by the lunatic's guardian, *Gibson v. Soper*, 6 Gray 279 (1856).

³ *Manning v. Gill*, L. R. 13 Eq. 485 (1872).

⁴ Thus, where a surrender of a note was made by the wife of a dying lunatic to whom it belonged, the surrender was held not to be binding, *Davis v. Lane*, 10 N. H. 156 (1839). A person who is incompetent cannot authorize an agent to execute a valid note for him, *Shotts v. Boyd*, 77 Ind. 223 (1881).

⁵ 1 Edwards § 24; Story on Prom. Notes § 101, note by Mr. Perkins. So held of deeds, *Jackson v. Gumaer*, 2 Cow. 552 (1826); *Allis v. Bidings*, 6 Mete. 415; *Wait v. Maxwell*, 5 Pick. 217; *Gibson v. Soper*, 6 Gray 279 (1856); *Ingraham v. Baldwin*, 9 N. Y. 45; *Cates v. Woodson*, 2 Dana 452 (1834); *Hovey v. Hobson*, 53 Me. 451 (1866); *Elston v. Jasper*, 45 Tex. 409 (1876); *Breckinridge v. Ormsby*, 1 J. J. Marsh. 236 (1829); *Fitzgerald v. Reed*, 9 Sm. & M. 94 (1847); *Lilly v. Waggoner*, 27 Ill. 395 (1862); *Arnold v. Richmond Iron Works*, 1 Gray 434 (1854); and of notes, in Indiana, notwithstanding a statute apparently declaring them void, *Crouse v. Holman*, 19 Ind. 30 (1862).

⁶ By *personal representatives or heirs*, *Breckinridge v. Ormsby*, 1 J. J. Marsh. 236 (1829); *Hovey v. Hobson*, 53 Me. 451 (1866). By *guardian*, *Crouse v. Holman*, 19 Ind. 30 (1862); *Gibson v. Soper*, 6 Gray 279 (1856). By *grantee* under subsequent deed, *Cates v. Woodson*, 2 Dana 452 (1834).

⁷ *Allen v. Berryhill*, 27 Iowa 534 (1869).

It is voidable rather than void, because it is capable of ratification.¹ But the contracts of a lunatic, it is said, after office found are absolutely void.² It seems, however, that even such contracts may be ratified.³ And a subsequent inquisition, finding the maker of a note to have been insane at the time of making it, will not affect the instrument in the hands of a *bona fide* holder for value before maturity.⁴ So, the force of an inquisition may be suspended during a lucid interval to enable the lunatic to make a will.⁵

A distinction is made, in regard to this question, between executed contracts and those which are only executory. Where the consideration is still executory, the contract will be declared void, even against a party who entered into it in ignorance of the mental condition of the other party.⁶ On the other hand, where the contract has been executed and the consideration paid and enjoyed, as in the case of goods sold to, and consumed by, a lunatic before inquisition found, no relief will generally be granted against an innocent party, although fraud on his part or knowledge of the lunatic's condition would make it otherwise.⁷ So, a lunatic is liable

¹*Allis v. Billings*, 6 Mete. 415 (1843); *Wait v. Maxwell*, 5 Pick. 217; *Eaton v. Eaton*, 8 Vroom 108 (1874), where a deed was voidable for fraud in reading it falsely to an aged and infirm man. So, the ratification of a deed may be inferred from subsequent receipt of the consideration, which had been secured by notes, *Arnold v. Richmond Iron Works*, 1 Gray 434 (1854).

²*Jackson v. Gumaer*, 2 Cow. 552 (1824); *Hovey v. Hobson*, 53 Me. 451 (1866); *Nichol v. Thomas*, 53 Ind. 42 (1876); *Fitzhugh v. Wilcox*, 12 Barb. 235 (1851). So held, also, as to a waiver of notice of protest after inquisition found, *Wadsworth v. Sherman*, 14 Barb. 169 (1851); *Wadsworth v. Sharpsteen*, 8 N. Y. 388 (1853). In Wisconsin a mortgage executed by a lunatic after inquisition found was declared to be "voidable if not void," *Mohr v. Tulip*, 40 Wis. 66 (1876). But goods sold and delivered to a lunatic purchaser two days after inquisition found form a good ground of action, in the absence of fraud and of knowledge of the lunacy and of the inquisition on the part of the seller, *Beals v. See*, 10 Penna. St. 56 (1848).

³1 Daniel 219; 1 Parsons 151.

⁴*Lancaster Co. Bank v. Moore*, 78 Penna. St. 407 (1875). So, too, of a deed, *Yauger v. Skinner*, 1 McCarter 389 (1862).

⁵*In re Burr*, 2 Barb. Ch. 208 (1847).

⁶*Byles* 64; *Sentance v. Poole*, 3 C. & P. 1 (1827); *Baxter v. Lord Portsmouth*, 2 *Ib.* 178; *S. C.*, 5 B. & C. 170; *S. C.*, 8 D. & Ry. 614. In the former case, *Sentance v. Poole*, the note was in an unusual form, payable "to your order."

⁷*Sergeson v. Sealey*, 2 Atk. 412 (1742); *Beals v. See*, 10 Penna. St. 56 (1848); *Matthiessen v. McMahon*, 9 Vroom 536 (1876); *Young v. Stevens*, 48 N. H. 133 (1868); *Wilder v. Weakley*, 34 Ind. 181 (1870); *Ballard v. McKenna*, 4

on his executed contract for necessities, but only for their actual value.¹ And his executor will be liable for such necessities sold to him before office found.² And even after office found it has been held that a lunatic is liable for necessary medical services rendered to his wife.³

§ 257. **Defense—Admissible when.**—It was formerly held that a person could not be allowed to “stultify himself” by setting up his lunacy in defense against a contract made by him.⁴ The absurdity of this rule is apparent, and it may

Rich. Eq. 358 (1852); *Sims v. McLure*, 8 Rich. Eq. 286 (1856); *Dodds v. Wilson*, 1 Treadw. So. Car. 448 (1813); *Scanlan v. Cobb*, 85 Ill. 296 (1877). And a court of equity will not interfere in such a case in a lunatic's behalf, *Loomis v. Spencer*, 2 Paige 153 (1830); *Niel v. Morley*, 9 Ves. 477 (1804); or to set aside a contract for purchase of land which has been executed by payment on the lunatic's part, *Beavan v. McDonnell*, 9 Exch. 309 (1854). Nor will equity set aside a deed made by a lunatic in consideration of a previous agreement for farm labor, under which the grantee had labored for the grantor sixteen years, *Canfield v. Fairbanks*, 63 Barb. 461 (1872). Nor an injunction bond, made by a lunatic to an obligee ignorant of that fact, *Behrens v. McKenzie*, 23 Iowa 333 (1867), *Dillon, J.*, comparing such bond rather to an executed than an executory contract; nor a lunatic's bond given for a loan made by an innocent party and not repaid, *Mutual Life Ins. v. Hunt*, 79 N. Y. 544 (1880); *Campbell v. Hooper*, 3 Sm. & Giff. 153 (1855). So, as to loans and services in general, *In re Beckwith*, 3 Hun 443 (1875). So, a sale of goods by a lunatic, in exchange for land afterwards lost by him on an execution sale, will not be rescinded by the court, *Hopson v. Boyd*, 6 B. Mon. 296 (1845); and see *Carr v. Holliday*, 1 Dev. & B. Eq. 344 (1836). So, premiums paid by a lunatic for an annuity enjoyed by him during his life, the vendor being chargeable neither with fraud nor knowledge, cannot be recovered by his executor, *Molton v. Camroux*, 4 Exch. 19 (1849). In like manner, where a lunatic has received the benefit of a sale made by his guardian and had sufficient capacity to transact business, he cannot have the sale set aside, *Searle v. Galbraith*, 73 Ill. 269 (1874). But goods sold to a lunatic in good faith, but negligently and without any benefit to him, will not support a recovery, *Lincoln v. Buckmaster*, 32 Vt. 652 (1860).

¹ 1 Parsons 149; 1 Story Eq. § 228; *Read v. Legard*, 6 Exch. 636 (1851); *Barnes v. Hathaway*, 66 Barb. 456 (1873); *Van Horn v. Hann*, 10 Vroom 207 (1877); *Hallett v. Oakes*, 1 Cish. 296 (1848); *Kendall v. May*, 10 Allen 59 (1865); *Skidmore v. Romaine*, 2 Bradf. 122 (1852); *Williams v. Wentworth*, 5 Beav. 325 (1842); *Sawyer v. Lufkin*, 56 Me. 308 (1868). So, a note given for a reaping machine by an insane person has been held binding upon him on the same ground, *McCormick v. Littler*, 85 Ill. 62 (1877). So, a contract for the hire of carriages and harness, *Baxter v. Lord Portsmouth*, 2 C. & P. 278 (1826); *S. C.*, 5 B. & C. 170.

² *La Rue v. Gilkison*, 4 Penna. St. 375 (1846); *Richardson v. Strong*, 13 Ired. 106 (1851); *Tally v. Tally*, 2 Dev. & B. Eq. 387 (1839). And an indorsement by a drunkard pending proceedings for the appointment of a guardian is good so far as it is in payment for necessities, *McCrillis v. Bartlett*, 8 N. H. 569 (1837). So, too, of an accommodation indorsement for a lunatic of a note made by his unauthorized agent, *Surles v. Pipkin*, 69 N. C. 513 (1873).

³ *Pearl v. McDowell*, 3 J. J. Marsh. 658 (1830).

⁴ *Byles* 63; *Chitty* 25; 1 Daniel 215; 1 Parsons 383; *Brown v. Joddrell*, 1 M. & M. 105 (1827); *S. C.*, 3 C. & P. 30; *Levy v. Baker*, 1 M. & M. 106;

now be regarded as abandoned.¹ The defense of lunacy is, however, still held to be unavailable in England, unless the fact was known to the other contracting party at the time.² And in the United States also it is held that, in the absence of such knowledge and of fraud, the contract cannot be avoided without full re-instatement of the other party in his former position.³

If the contract has been obtained from the lunatic through fraud, this will be a good defense even against a *bona fide* holder for value.⁴ So, an accommodation indorsement will

Dane v. Kirkwall, 8 C. & P. 679 (1838); *Beverley's Case*, 4 Coke 126; *Stroud v. Marshall*, Cro. Eliz. 398. This rule is well declared by Fonblanque to be "in defiance of natural justice and the universal practice of all the civilized nations in the world," 1 Fonbl. Eq. 46. The case of *Brown v. Joddrell*, *supra*, has been overruled in Massachusetts, *Seaver v. Phelps*, 11 Pick. 304 (1831). In this case Lord Tenterden had laid down the rule as follows: "I think this defense cannot be allowed and that no person can be suffered to stultify himself and to set up his own lunacy as a defense. If indeed it can be shown that the defendant has been imposed upon by the plaintiff in consequence of his mental imbecility, it might be otherwise, and such a defense might be admitted." In *Webster v. Woodford*, 3 Day 101, it is said that, "in the time of Edward I. *non compos mentis* was allowed to be a sufficient plea to avoid a man's own bond. It was not until the reign of Edward III. that any scruple was entertained respecting the power of a person who had been *non compos mentis* to avoid his act, and it was as late as the reign of Henry VI. before there was any judicial determination that a person who had been *non compos mentis* could not avoid a deed given by him during his insanity. * * * The ancient common law was that a man might allege his own incapacity to avoid his deed, and this remained law during a long period of time and has never been altered by any legal act, but the contrary doctrine depends upon decisions of courts in direct opposition to the common law."

¹ Byles 63; 1 Daniel 215; 1 Edwards § 25; 1 Parsons 149; *Gore v. Gibson*, 13 M. & W. 623 (1845); *Alcock v. Alcock*, 3 Man. & G. 268 (1841); *Rice v. Peet*, 15 Johns. 503 (1819); *Mitchell v. Kingman*, 5 Pick. 431 (1827); *Fitzhugh v. Wileox*, 12 Barb. 237 (1851); *Webster v. Woodford*, 3 Day 90 (1808); *Taylor v. Dudley*, 5 Dana 308 (1837); *Lang v. Whidden*, 2 N. H. 435 (1822). And the insanity of one who has signed a note as surety may be set up in defense against a holder who had no knowledge of it, *Van Patton v. Beals*, 46 Iowa 62 (1877).

² Byles 64; *Molton v. Camroux*, 4 Exch. 19, affirming 2 *Ib.* 487; *Beavan v. McDonnell*, 9 *Ib.* 309; *Elliot v. Ince*, 7 DeG. M. & G. 475. See, too, 1 Parsons 149, where this is said to be "possibly" the rule. And see *Shoulters v. Allen*, 51 Mich. 529 (1883); *Moore v. Hershey*, 90 Penna. St. 196 (1879). And this seems to be the rule by statute in Louisiana, *Succession of Smith*, 12 La. An. 24 (1857).

³ *Carr v. Holliday*, 1 Dev. & B. Eq. 344 (1836); *Fitzgerald v. Reed*, 9 Sm. & M. 94 (1847); *Yauger v. Skinner*, 1 McCarter 389 (1862).

⁴ *Chitty* 24; 1 Daniel 216; *Sentance v. Poole*, 3 C. & P. 1 (1827); *Moore v. Hershey*, 90 Penna. St. 196 (1879). In the words of Paxson, J., in *Moore v. Hershey*, *supra*, p. 201, "If such paper can be protected in the hands of a holder who has paid value, however trifling, this helpless class would have

not render a lunatic liable even to a *bona fide* holder for value.¹ This is true, too, of a note pledged by one who is *non compos mentis*;² or indorsed for much less than its actual value.³

It seems, moreover, that the insanity of an indorser may be set up by the maker of a note in defense to a suit on it by the indorsee,⁴ although this seems to be a departure from the common rule as to such defenses. And it seems reasonable, as in other cases of one party's incapacity, that this should in no way affect the holder's remedy against other parties.⁵

§ 258. **What Amounts to Insanity.**—It is not necessary to a complete defense that the party alleged to be incapable should be wholly or even partially deranged. Any imbecility is a sufficient defense, which renders him incapable of fully understanding and intending the contract in question, especially if such imbecility on his part be accompanied with fraud on the other side.⁶ Mere weakness of intellect, however, without fraud, is no defense.⁷ But the import-

little protection. A principle that renders such results possible must be essentially and radically wrong. We believe that none such exists. On the contrary, the true rule applicable to such cases is that while the purchaser of a promissory note is not bound to inquire into the consideration, he is affected by the status of the maker—as in the case of a married woman or a minor. In neither of these cases can he recover against the maker. In the case of a lunatic, however, he may recover, provided he had no knowledge of the lunacy and the note was obtained without fraud and upon a proper consideration."

¹Wirebach v. First Nat. Bank, 97 Penna. St. 543 (1881). So, where the lunatic has signed a note as surety, Van Patton v. Beals, 46 Iowa 62 (1877).

²Seaver v. Phelps, 11 Pick. 304 (1831).

³Jeneson v. Jeneson, 66 Ill. 259 (1872).

⁴Burke v. Allen, 29 N. H. 106 (1854); Peaslee v. Robbins, 3 Metc. 164 (1841). As to the invalid character of such a transfer, see also, Hannahs v. Sheldon, 20 Mich. 278 (1870). But it has been held that the maker cannot set up in defense at suit of an indorsee that the indorsement was procured by undue influence where the indorser has not disaffirmed it, Carrier v. Sears, 4 Allen 336 (1862).

⁵1 Parsons 150.

⁶Johnson v. Chadwell, 8 Humph. 145 (1847).

⁷Chitty 25; 1 Daniel 217; 1 Edwards § 24; 2 Bl. Com. 292; Baxter v. Lord Portsmouth, 8 D. & Ry. 614; S. C., 5 B. & C. 170; S. C., 2 C. & P. 178; Faulder v. Silk, 3 Campb. 126; Yates v. Boen, 2 Stra. 1104; Lewis v. Pead, 1 Ves. Jr. 19 (1789); Farnam v. Brooks, 9 Pick. 212 (1830); Graham v. Castor, 55 Ind. 559 (1877); Marmon v. Marmon, 47 Iowa 121 (1877); Maddox v. Sim-

ance of mental weakness as evidence of fraud is not to be overlooked.¹

§ 259. **Pleading—Evidence.**—It was formerly held, in England, that lunacy as a defense must be specially pleaded.² And the presumption of law is in favor of sanity.³ This throws the burden of proof upon the party making the allegation of insanity, but the presumption of sanity may be rebutted and the burden of proof shifted by proof of general derangement.⁴

Periodical intervals of recovery will, however, destroy any such presumption of insanity.⁵

§ 260. **Inquisition—How far Conclusive.**—Even an inquisition and finding of insanity will not be conclusive evidence

mons, 31 Ga. 512 (1860). Parker, C. J., in *Farnam v. Brooks*, *supra*, p. 20, says: "We understand the law to be that no degree of physical or mental imbecility which leaves the party legal competency to act is of itself sufficient to avoid a contract or settlement with him, but if advantage is taken of his weakness to draw from him a contract or settlement which is unfavorable by misrepresentation, imposition or undue influence, such contract or settlement cannot be upheld in a court of equity."

¹Harris v. Wamsley, 41 Iowa 671 (1875); Hoagland v. Titus, 1 C. E. Gr. 44 (1863); McFadden v. Vincent, 21 Tex. 47 (1858); especially when coupled with inadequacy of consideration, Cadwallader v. West, 48 Mo. 483 (1871). So, too, the weakness of old age, James v. Langdon, 7 B. Mon. 193 (1846); Wilson v. Oldham, 12 Ib. 55 (1851); Coleman v. Frazer, 3 Bush 300 (1867); Eaton v. Eaton, 8 Vroom 108 (1874). So, the fact that the person defrauded was illiterate and unable to read the paper signed by him, Anderson v. Walter, 34 Mich. 113 (1876); First Nat. Bank v. Lierman, 5 Neb. 247 (1876).

²Byles 64; 1 Daniel 215; 1 Edwards § 26; Harrison v. Richardson, 1 M. & Rob. 504 (1835). But see, *contra*, Mitchell v. Kingman, 5 Pick. 431 (1827). Such plea should, however, set up that the defendant was *non compos mentis* at the time when the contract was made, Taylor v. Dudley, 5 Dana 309 (1837).

³1 Daniel 214; 1 Edwards § 26; 1 Parsons 150; Jackson v. King, 4 Cow. 207 (1825). But the presumption may be rebutted by common report to the contrary, Rogers v. Walker, 6 Penna. St. 371 (1847).

⁴Jackson v. Van Dusen, 5 Johns. 144 (1809); Aurentz v. Anderson, 3 Pittsb. 310 (1871). When, however, the presumption of sanity is once rebutted by common report, &c., the burden of proving a lucid interval falls on the person who seeks to hold the alleged lunatic, Rogers v. Walker, 6 Penna. St. 371 (1847). In such case actions touching the same subject-matter at times when he was admitted to be sane are admissible as evidences of his sanity; *e. g.* his subsequently taking indemnity against the note given by him and in controversy, Grant v. Thompson, 4 Conn. 203 (1822).

⁵Carpenter v. Carpenter, 8 Bush 283 (1871); Staples v. Wellington, 58 Me. 453 (1870); People v. Francis, 38 Cal. 183 (1869). "The question is whether such transaction has been affected by it," Beasley, C. J., in *Lozeau v. Shields*, 8 C. E. Gr. 509 (1872).

against any one not a party to it.¹ Nor will the finding of a probate court of equity, afterward affirmed by inquisition and verdict, be conclusive against the validity of a deed executed by the lunatic in the interval.² But an inquisition and finding will amount to sufficient proof until overcome by other evidence;³ and will be admissible as evidence even against an earlier contract.⁴ And proof of insanity of the maker of a note both before and after it was made is a sufficient defense to the note on his part.⁵

The subsequent insanity of the maker of a note will not, however, be a defense, even though the payee and plaintiff has been appointed guardian for him.⁶

¹*Sergeson v. Sealey*, 2 Atk. 412 (1742); *Den v. Clark*, 5 Halst. 217 (1828); *Hart v. Deamer*, 6 Wend. 497 (1831); *Osterhout v. Shoemaker*, 3 Hill 516 (1842); *Hoyt v. Adees*, 3 Lans. 173 (1870). But in *White v. Palmer*, 4 Mass. 150, Chief Justice Parsons says: "There are some strong grounds on which it may be inferred that a letter of guardianship of any person adjudged to be *non compos* so long as it is unrevoked or not annulled is conclusive evidence of his insanity, but on this point we give no opinion." And see, to same effect, *Wadsworth v. Sharpsteen*, 8 N. Y. 388 (1853); *Leonard v. Leonard*, 14 Pick. 283 (1833). And so, too, as to contracts made afterward, *Tozer v. Saturlee*, 3 Grant Cas. 162 (Pa. 1855). After a man's reason has been restored, a prior decree of insanity and letters of guardianship unrevoked are not conclusive evidence against the validity of a will made three years afterward, *Stone v. Damon*, 12 Mass. 488 (1815); *Breed v. Pratt*, 18 Pick. 115 (1836).

²*Gibson v. Soper*, 6 Gray 279 (1856).

³*Sergeson v. Sealey*, 2 Atk. 412; *Hicks v. Marshall*, 8 Hun 327 (1876); *Hoyt v. Adees*, 3 Lans. 173; *White v. Palmer*, 4 Mass. 147 (1808); *Goodell v. Harrington*, 3 T. & C. 345 (1874); *Rogers v. Walker*, 6 Penna. St. 371 (1847); *Tozer v. Saturlee*, 3 Grant Cas. 162 (Pa. 1855); *McGinnis v. Commonwealth*, 74 Penna. St. 245 (1873). And may be traversed, *Sergeson v. Sealey*, *supra*; or met by other evidence to the contrary without formal traverse, *Den v. Clark*, 5 Halst. 217 (1828).

⁴1 Edwards § 27; *Hicks v. Marshall*, 8 Hun 327 (1876). And, *a fortiori*, a finding that the obligor of a bond was a lunatic before its execution, *Faulder v. Silk*, 3 Campb. 126 (1811).

⁵*Ellars v. Mossbarger*, 9 Bradw. 122 (1881).

⁶*Smith v. Davis*, 45 N. H. 566 (1864).

IV. DRUNKARDS.

261. Drunkenness—A Valid Defense.

262. Commercial Paper.

263. Defense—When Admissible.

264. Action—Pleading—Evidence.

§ 261. **Drunkenness—A Valid Defense.**—The mental condition of a drunkard, so far as it renders him imbecile or insane, seems to entitle him to the same protection and defenses that belong to an idiot or lunatic. Formerly, however, drunkenness was held to be no defense without fraud.¹ And it is still the rule of law that partial drunkenness, not involving actual mental incapacity, is no defense,² unless there be fraud in connection with it.³

Drunkenness, however, like weakness of intellect, is important evidence in ascertaining whether fraud has been practiced.⁴ And even partial drunkenness will be regarded as strong evidence of fraud, if induced by the other party to the contract.⁵ So, if a note be made by a person enfeebled by disease and drinking, this will in some cases, of itself, raise a presumption of fraud.⁶ If, on the other hand, a person has made himself drunk for the purpose of

¹ Byles 64; 1 Parsons 151; *Johnson v. Medlicotte*, 3 P. Wms. 130 (1734), *Cooke v. Clayworth*, 18 Ves. 12 (1811). See, too, *Wilson v. Nisbet*, Morison 1509 (Scotch Sessions 1736).

² 1 Daniel 219; 1 Edwards § 28; 1 Parsons 151; *Johns v. Fritchey*, 39 Md. 258 (1873); *Bates v. Ball*, 72 Ill. 108 (1874); *Miller v. Finley*, 26 Mich. 249 (1872); *Cavender v. Waddingham*, 5 Mo. App. 457 (1878). In this case, p. 465, Bakewell, J., lays down the rule as follows: "Mere excitement from the use of intoxicating liquors is not such drunkenness as will enable a party to avoid his contracts. Such excitement and drunkenness must be excessive and absolute, so as to suspend the reason and create impotence of mind at the time of entering into the contract." It must be "so great as to produce an absolute privation of understanding for the time similar to cases of idiocy or insanity," *Blackford, J., in Harbison v. Lemon*, 3 Blackf. 51 (1832).

³ Chitty 104; *Burroughs v. Richman*, 1 Green 233 (N. J. 1832).

⁴ *Prentice v. Achorn*, 2 Paige 30 (1830); *French v. Hickox*, 8 Ohio 214 (1837).

⁵ *Samuel v. Marshall*, 3 Leigh 567 (1832); *Curtis v. Hall*, 1 South. 361 (1817).

⁶ *Holland v. Barnes*, 53 Ala. 83 (1875).

giving his contract such an appearance or raising such presumption, he will be estopped from setting up the defense.¹

§ 262. **Commercial Paper.**—Total drunkenness is, in general, a perfect defense against the drunkard's bill or note.² And where a contract for work has been made by a man while drunk, he may recover the actual value of the work done without the production of the contract.³ The validity of such defense to a bill of exchange is recognized in England, where the bill has been obtained by fraud,⁴ both as against the party originally receiving it,⁵ and against all holders with notice.⁶ On the other hand, drunkenness is no defense against a *bona fide* holder for value before maturity.⁷ And it has been held that a contract by one who is drunk may be avoided, although the other party be not guilty of fraud or fault.⁸ It has also been held that a drunkard's note is void and cannot be ratified.⁹ The better opinion is, however, that it is only voidable,¹⁰ and can be ratified.¹¹

In many States the contracts of *habitual drunkards* are

¹ Daniel 220; 1 Parsons 151.

² Byles 64; 1 Daniel 219; 1 Edwards § 28; Gore v. Gibson, 13 M. & W. 623 (1845); Bliss v. Railroad, 24 Vt. 424 (1852); Berkley v. Canon, 4 Rich. L. 136 (1850); Harbison v. Lemon, 3 Blackf. 51 (1832); Wigglesworth v. Steers, 1 H. & Munf. 70 (1806); Phelan v. Gardner, 43 Cal. 306 (1872); Reinskopf v. Rogge, 37 Ind. 207 (1871). So, to a bond, Morris v. Clay, 8 Jones L. 216 (1860); or deed, French v. Hickox, 8 Ohio 214 (1837). So, the drunkenness of one joint obligor of a bond, Jenners v. Howard, 6 Blackf. 240 (1842). And a contract executed "after reaching a stage of *delirium tremens* in 1850 and being crazy, silly and foolish when drunk then, and continuing constantly in this habit for four years longer," was set aside as the act of one *non compos mentis*, Menkins v. Lightner, 18 Ill. 282 (1857). On the other hand, a broken-down inebriate with occasional fits of insanity is not to be presumed insane, so as to relieve the defense of the burden of proof, Gardner v. Gardner, 22 Wend. 526 (1839).

³ Fenton v. Holloway, 1 Stark. 126 (1815).

⁴ Pitt v. Smith, 3 Campb. 33.

⁵ Chitty 24; Pitt v. Smith, *supra*; Gregory v. Frazer, 3 Campb. 454; Fenton v. Holloway, *supra*; Yates v. Boen, 2 Stra. 1104; Bul. N. P. 172.

⁶ Molton v. Camroux, 2 Exch. 487, affirmed 4 *Ib.* 19.

⁷ Chitty 24; 1 Daniel 219; Northam v. Latouche, 4 C. & P. 145; Johnson v. Medlicotte, 3 P. Wms. 130; McSparran v. Neeley, 91 Penna. St. 17 (1879); State Bank v. McCoy, 69 *Ib.* 204 (1871).

⁸ Barrett v. Buxton, 2 Aik. 167 (1826).

⁹ Berkley v. Canon, 4 Rich. 136 (1850).

¹⁰ Joest v. Williams, 42 Ind. 565 (1873); McGuire v. Callahan, 19 *Ib.* 128.

¹¹ Mathews v. Baxter, L. R. 8 Exch. 132.

made void by statute.¹ And it has been held, in Pennsylvania, that, after office found, a habitual drunkard cannot bar the Statute of Limitations on a former note by a new promise of payment.²

§ 263. **Defense—When Admissible.**—Drunkenness is, in general, not a valid defense, unless the consideration received can be returned.³ In all such cases, a distinction is to be made between express contracts and those which the law implies.⁴ In the latter case, *e. g.* a contract for necessities purchased and consumed by the drunkard, the contract may be binding on the drunkard, though made by him after the appointment of a guardian.⁵

§ 264. **Action—Pleading—Evidence.**—Where a note is made by a drunkard before the appointment of a guardian, the action on it must be brought against him and not against the guardian.⁶ The defense of drunkenness should be specially pleaded,⁷ although it has been held to be admissible

¹ Thus, an indorsement made pending a proceeding for the appointment of a guardian for such drunkard transfers no title, *McCrellis v. Bartlett*, 8 N. H. 569 (1837). Much more after inquisition found, *L'Amoureux v. Crosby*, 2 Paige 427 (1831), under New York act of 1821; *Clark v. Caldwell*, 6 Watts 139 (1837), under Pennsylvania act of 1819. So, a bond executed after inquisition found, *Imhoff v. Whitmer*, 31 Penna. St. 243 (1858). So, the waiver of notice of protest by a drunkard after inquisition found, *Wadsworth v. Sharpsteen*, 8 N. Y. 388 (1853); *Wadsworth v. Sherman*, 14 Barb. 169 (1851); or a will under like circumstances, *In re Patterson*, 4 How. Pr. 34 (1849).

² *Hannum's Appeal*, 9 Penna. St. 471 (1848).

³ *Joest v. Williams*, 42 Ind. 565 (1873); *McGuire v. Callahan*, 19 *Ib.* 128. But in *Berkley v. Canon*, 4 Rich. 136 (1850), a note, given while very drunk, for the purchase of a horse, was held void, leaving undecided the question of a right to recover for the value of the horse.

⁴ "Where the right of action is grounded upon a specific distinct contract requiring the assent of both parties, and one of them is incapable of assenting, in such a case there can be no binding contract; but in many cases the law does not require an actual agreement between the parties but implies a contract from the circumstances—in fact, the law makes the contract for the parties. Thus, * * * a tradesman who supplies a drunken man with necessities may recover the price of them, if the party keeps them when he becomes sober, although a count for goods bargained and sold would fail," *Pollock, C. B.*, in *Gore v. Gibson*, 13 M. & W. 625.

⁵ *Darby v. Cabanne*, 1 Mo. App. 126 (1876). But the burden of proving that a note given by a drunkard was for necessities rests on the party offering it, *Devin v. Scott*, 34 Ind. 67 (1870).

⁶ *Coombs v. Janvier*, 2 Vroom 240 (1865).

⁷ *Byles* 64; 1 *Daniel* 220; *Gore v. Gibson*, 13 M. & W. 623.

under the general issue.¹ The fact of drunkenness and the degree of incapacity caused by it are for the jury to determine.² The burden of proof lies on the party alleging it as a defense;³ but if insanity for such cause be once shown, the burden is shifted to the plaintiff to establish sanity at the time of the contract in question.⁴ The finding of an inquisition, as in the case of lunacy, is presumptive evidence to support the defense.⁵ And it seems that a note, inadmissible as evidence of debt for want of a stamp, is admissible as evidence of the maker's condition at the time in disproof of an allegation of drunkenness and fraud.⁶ As with other defenses, where the fact of drunkenness is once established, the burden is thrown upon the holder of the paper to show himself a *bona fide* holder for value before maturity.⁷

¹Pitt v. Smith, 3 Campb. 33 (1811).

²Cummings v. Henry, 10 Ind. 109 (1858).

³Burroughs v. Richman, 1 Green 233 (N. J. 1832).

⁴Menkins v. Lightner, 18 Ill. 282 (1857). But evidence that the maker of the note was a broken-down inebriate with occasional fits of insanity is not enough to shift the burden of proof, Gardner v. Gardner, 22 Wend. 526 (1839).

⁵McGinniss v. Commonwealth, 74 Penna. St. 245 (1873). But in Devin v. Scott, 34 Ind. 67 (1870), it was held to be conclusive evidence.

⁶Gregory v. Fraser, 3 Campb. 454.

⁷Hale v. Brown, 11 Ala. 87 (1847).

V. INFANTS.

- 265. Disability of Infants—Foreign Statutes.
- 266. Common Law.
- 267. Contracts for Benefit—Executed and Executory.
- 268. in Trade.
- 269. for Necessaries.
- 270. Commercial Paper—Infant Maker—Acceptor.
- 271. Infant Indorser.
- 272. Defense of Infancy Personal—Estoppel.
- 273. Ratification—What Amounts to.
- 275. Implied.
- 276. Requisites of.
- 277. Disaffirmance—What Amounts to.
- 278. Action—Defense—Pleading.

§ 265. **Disability of Infants—Foreign Statutes.**—By the law merchant, as by the common law of England, infants are incapable of binding themselves by legal contract. This incapacity extends at common law, and by statute in most of the United States, to all persons under the age of twenty-one years. The minority of women ends, however, by the statutes of some States, at the age of eighteen years.¹ Such contracts of infants as were formerly voidable at common law are now made void by the Infants' Relief Act, passed in England in 1874.² By the Code Napoleon, and in the countries following its lead, bills of exchange drawn by minors, who are not traders, are void as to them, although the rights of other parties relative to one another are saved.³

¹*Arkansas* (1873 R. S. § 3034); *Iowa* (1880 Rev. Code § 2237).

²37 and 38 Vict. c. 62. This act provides as follows: § 1. "All contracts, whether by specialty or by simple contract, henceforth entered into by infants for the repayment of money lent or to be lent, or for goods supplied or to be supplied (other than contracts for necessities), and all accounts stated with infants shall be void; provided, always, that this enactment shall not invalidate any contract into which an infant may by any existing or future statute or by the rules of common law or equity enter, except such as now by law are voidable." § 2. "No action shall be brought whereby to charge any person upon any promise made after full age to pay any debt contracted during infancy, or upon any ratification made after full age of any promise or contract made during infancy, whether there shall or shall not be any new consideration for such promise or ratification after full age."

³*France* (1807 Code Napoleon Art. 114); *Greece* (1835 Code Com. Art. 114); *Haiti* (1826 Code Com. Art. 112); *Italy* (1865 Code Com. Art. 200); *Monaco* (1818 Code Com. Art. 104); *Roumania* (1840 Code Com.); *Servia* (1860 Code Com. Art. 79); *San Domingo* (1844 Code Napoleon Art. 114). In the Servian Code the liability of an infant for benefit actually received is reserved, although his bill of exchange is declared void.

By the German Exchange Law an infant's power to make a bill or note is, in general, co-extensive with his power to make other binding contracts. This power exists for the most part only where the infant contracts as a merchant.¹ In Venezuela such bills are mere acknowledgments of debt and not subject to the rules of the *lex mercatoria*, unless the infant have been declared competent to engage in trade.²

§ 266. **Disability at Common Law.**—The rule of the English common law is that infants' contracts are, in general, not absolutely void, but only voidable, and therefore capable of ratification.³ This is true even of contracts which are not for necessities.⁴ Thus, an exchange of horses by an infant is voidable, and he may recover the price agreed on.⁵ So, if a horse purchased by him is retained by his administrator, the voidable contract is ratified and the infant's estate liable.⁶ So, a seaman's contract is voidable only, and he may recover a *quantum meruit*.⁷ The following contracts by an infant have, in like manner, been held to be voidable only and capable of ratification: a chattel mortgage;⁸ an undertaking for a stay of execution;⁹ a marriage contract;¹⁰ an account stated;¹¹ and even a deed reciting a valuable consideration received.¹²

§ 267. **Contracts Beneficial or Otherwise—Executory or**

¹Thöl's Wechselrecht 108. In some cases, however, the consent of the minor's guardian is required, *Ib*.

²Venezuela (1862 Code Com. Art. 8).

³Chitty 27; Warwick v. Bruce, 2 M. & S. 205 (1813); S. C., 6 Taunt. 118. See, too, Byles 59; Story on Prom. Notes § 67; 1 Parsons 67; Tucker v. Moreland, 10 Pet. 59 (1836); Rogers v. Hurd, 4 Day 57 (1809); Woolston v. King, Pen. 1049 (N. J. 1813); Moses v. Stevens, 2 Pick. 332 (1824).

⁴Hands v. Slaney, 8 T. R. 578.

⁵Grace v. Hale, 2 Humph. 27 (1840).

⁶Shropshire v. Burns, 46 Ala. 108 (1871).

⁷Vent v. Osgood, 19 Pick. 572 (1837).

⁸Chapin v. Shafer, 49 N. Y. 407 (1872).

⁹Harner v. Dipple, 31 Ohio St. 72 (1876).

¹⁰Willard v. Stone, 7 Cow. 22 (1827). So, too, a marriage settlement, Jones v. Butler, 30 Barb. 641 (1859).

¹¹Williams v. Moor, 11 M. & W. 256 (1843).

¹²Bool v. Mix, 17 Wend. 119 (1837); Wheaton v. East, 5 Yerg. 41 (1833); Bozeman v. Browning, 31 Ark. 364 (1876). But see Porch v. Fries, 3 C. E. Green 204.

Executed.—The true distinction is probably between contracts which are for the advantage of the infant and those which are not, the latter being held to be void and the former only voidable.¹ Thus, a note given by an infant for the debt of another, is void,² although it has been held that even such a note may be ratified.³ On the other hand, a contract for the hire of a servant, which has been for the benefit of the minor, will be binding upon him.⁴ And it has been held that a contract which has been made for the advantage of the infant, may be enforced against him in equity.⁵ But if the contract be merely executory, *e. g.* a sale of goods to be delivered, it will not be binding on the infant without such delivery made.⁶

§ 268. **Contracts in Trade.**—Where an infant is engaged in trade, either alone or as member of a firm, his contract in such business is voidable only.⁷ And even his note given for goods purchased by his firm has been held to be voidable only.⁸ An infant is not, however, liable in general on a partnership note given by the firm, to which he belongs.⁹ As to the infant partner such note is voidable, and it seems that if it be a joint note, the other partners cannot be held upon it without him, until it is disaffirmed by him.¹⁰ If,

¹*Zouch v. Parsons*, Burr. 1794, recognized by Lord Eldon in 17 Ves. Jr. 383; *Allen v. Allen*, 2 D. & W. 307; *Rogers v. Hurd*, 4 Day 57 (1809).

²*Maples v. Wightman*, 4 Conn. 376 (1822); *Wentworth v. Wentworth*, 5 N. H. 410 (1831); *Fetron v. Wiseman*, 40 Ind. 148 (1872); *Williams v. Harrison*, 11 So. Car. 12 (1878).

³*Owen v. Long*, 112 Mass. 403 (1873); *Fetron v. Wiseman*, *supra*; *Williams v. Harrison*, *supra*.

⁴*Wood v. Fenwick*, 10 M. & W. 195 (1842).

⁵*Radford v. Westcott*, 1 Desaus. 596 (1800).

⁶*Fonda v. Van Horne*, 15 Wend. 635 (1836).

⁷*Hunt v. Massey*, 5 B. & Ad. 902 (1834); S. C., 2 Nev. & M. 109. So, too, a note for goods purchased for business purposes, *Wright v. Steele*, 2 N. H. 51 (1819); *Thing v. Libbey*, 16 Me. 55 (1839); *Booth v. McFarland*, 2 La. An. 398 (1847); *Skinner v. Maxwell*, 66 N. C. 45 (1872). But see, *contra*, as to an infant's business note, *Van Winkle v. Ketcham*, 3 Cai. 323 (1805); *Houston v. Cooper*, Pen. 866 (N. J. 1811). And as to other business contracts, *e. g.* a sale of goods, *Latt v. Booth*, 3 C. & K. 292.

⁸*Minock v. Shortridge*, 21 Mich. 304 (1870).

⁹*Conklin v. Ogborn*, 7 Ind. 553 (1856); *James v. Alford*, 15 La. An. 506 (1860).

¹⁰*Walmsley v. Lindenberger*, 2 Rand. 478 (1824).

however, the infant has failed to give public notice of his leaving the firm, he will be liable, after coming of age, upon firm notes given after that time, as in the case of an adult retiring partner.¹

§ 269. **Contracts for Necessaries.**—An exception to the rule exonerating infants from liability, is made by the law in favor of contracts for necessities. But what are necessities is a question of fact for the jury.² Where one who sells goods to an infant seeks to recover for them as necessities, he assumes the burden of proving them such.³ Among many things held under the circumstances of the individual case to be necessities for an infant are a miner's outfit,⁴ solitaire diamonds,⁵ board,⁶ funeral expenses for husband.⁷ While, on the contrary, a horse and saddle,⁸ horse hire for a minor student at Oxford,⁹ and even college tuition and room-rent,¹⁰ have been held not to be necessities. The circumstances of each particular case must be left to determine the question as one of fact only in that case.

But if the infant is provided with necessities, he will not be liable for goods which might otherwise be held necessary for him.¹¹ So, too, if he is living with his parents,¹² or has left his father's house voluntarily,¹³ or has purchased the goods without the consent of his guardian, while remaining

¹Goode v. Harrison, 5 B. & Ald. 147.

²Ryder v. Wombwell, L. R. 4 Ex. 32 (1868); Bonney v. Reardin, 6 Bush 34 (1869).

³Kline v. L'Amoureux, 2 Paige 419 (1831).

⁴Breed v. Judd, 1 Gray 455 (1854).

⁵Ryder v. Wombwell, L. R. 4 Ex. 32 (1868).

⁶Bradly v. Pratt, 23 Vt. 378 (1851). And a note given for it was held valid, *Ib.*

⁷Chapple v. Cooper, 13 M. & W. 252.

⁸Beeler v. Young, 1 Bibb 519 (1809).

⁹Harrison v. Fane, 1 Man. & G. 550 (1840).

¹⁰Middlebury College v. Chandler, 16 Vt. 683 (1844).

¹¹Byles 59; 1 Daniel 227; Kline v. L'Amoureux, 2 Paige 419 (1831); Perlin v. Wilson, 10 Mo. 451 (1847).

¹²Wailing v. Toll, 9 Johns. 141 (1812); Connolly v. Hull, 3 McCord 6 (1825); Jones v. Colvin, 1 McMull. 14 (1840).

¹³Angel v. McLellan, 16 Mass. 28 (1819).

under his charge,¹ he will not be liable for them as necessities. Nor will he be liable for food and clothing furnished him under an indenture of apprenticeship which is void for want of his guardian's consent.² Moreover, an infant is not liable for money borrowed, although he has spent it on necessities.³ But a debt so incurred will be included under a general provision in his will for the payment of his debts.⁴ In like manner, an account stated by an infant for necessities will not be binding upon him, although, as we have seen, it may afterward be ratified by him.⁵ So, a bond with penalty and interest given by an infant is of no effect, and, it is said, cannot be ratified;⁶ although, it seems, he may give a bond without penalty or interest for the exact sum due for necessities furnished him.⁷

§ 270. **Commercial Paper—Infant Maker—Acceptor.**—The bill or note of an infant, like his other contracts, is, in general, voidable only and may be ratified.⁸ On the other hand, a court of equity will assume jurisdiction for the purpose of setting aside, on the ground of fraud, a note made after the maker's attaining his majority, for extravagant supplies sold to him while an infant.⁹ But a note given by an

¹ *Watson v. Heasel*, 7 Watts 344 (1838). Nor will the guardian himself be liable in such case, *Elrod v. Myers*, 2 Head 33 (1858). But a guardian, who has assented to a sale of goods to his ward, cannot avoid it, *Oliver v. Houdlet*, 13 Mass. 237 (1816).

² *Guthrie v. Murphy*, 4 Watts 80 (1835).

³ *Darby v. Boucher*, 1 Salk. 279.

⁴ *Marlow v. Pitfield*, 1 P. Wm. 558.

⁵ Byles 61; Chitty 26; 1 Edwards § 32; *Trueman v. Hirst*, 1 T. R. 40; *Bartlett v. Emery*, *Id.* 42 n.; *Ingledew v. Douglass*, 2 Stark. 36 (1817).

⁶ Story on Prom. Notes § 77; *Baylis v. Dinely*, 3 M. & S. 477 (1815); *Hunter v. Agnew*, 1 Fox & Sm. 15; *Russell v. Lee*, 1 Lev. 86; *Fisher v. Mowbray*, 8 East 330 (1807).

⁷ Byles 59; Chitty 26; 1 Daniel 227; 1 Parsons 68; *Russell v. Lee*, 1 Lev. 86; *Trueman v. Hirst*, 1 T. R. 41.

⁸ Byles 60; Chitty 27; 1 Daniel 226; *Reed v. Batchelder*, 1 Metc. 559 (1840); *Everson v. Carpenter*, 17 Wend. 419 (1837); *Hodges v. Hunt*, 22 Barb. 150 (1856); *Stokes v. Brown*, 3 Pinney 311 (Wis. 1851); *Font v. Cathcart*, 8 Ala. 725 (1845); *Best v. Givers*, 3 B. Mon. 72 (1842); *Aldrich v. Graves*, 10 N. H. 194 (1839); *Boody v. McKenney*, 23 Me. 517 (1844); *Goodsell v. Myers*, 3 Wend. 479 (1830); *Alsop v. Todd*, 2 Root 109 (1794); *Stern v. Freeman*, 4 Metc. 309 (Ky. 1863); *Trustees of La Grange Inst. v. Anderson*, 63 Ind. 367 (1878); *Wright v. Steele*, 2 N. H. 51 (1819); *Thing v. Libbey*, 16 Me. 55 (1839).

⁹ *Brook v. Galby*, 2 Atk. 34.

infant for the exact value of necessities supplied to him will support a recovery,¹ although it may be doubted whether the note in such cases is more than *prima facie* evidence of the purchase made and the value of the goods.² But if the note be ratified by the infant after attaining full age, there can be no doubt of its legal force.³ Such a note has, however, been held valid without ratification so as to render the maker liable to a surety paying the same.⁴

The general rule, nevertheless, remains unaltered, that without ratification an infant is not liable on his note as such, although given for necessities;⁵ while some cases hold such a note to be void,⁶ leaving unaffected the payee's right to recover the value of the necessities furnished.⁷ And in such case a bill of exchange given for necessities has been canceled by a court of equity and decree rendered for the payment of the reasonable value.⁸ So, the collection of a note made by an infant has been restrained by injunction.⁹ It has been held, however, that such a note given for necessities is admissible evidence, under the common counts, to sustain a recovery for the value of the goods furnished.¹⁰

On the same principle, the acceptance of a bill of exchange by an infant is invalid.¹¹ Although he would be liable

¹Bradly v. Pratt, 23 Vt. 378 (1851); Dubose v. Wheddon, 4 McCord 221 (1827). But see Fenton v. White, 1 South. 100 (1818). And see, *contra*, Ayers v. Burns, 87 Ind. 245 (1882).

²Morton v. Steward, 5 Bradw. 533 (1879).

³Lawson v. Lovejoy, 8 Me. 405 (1832); Cheshire v. Barrett, 4 McCord 241 (1827); Bobs v. Hansell, Bailey 114 (1831).

⁴Haines' Admr. v. Tenant, 5 Hill 400 (So. Car. 1834); Conn v. Coburn, 7 N. H. 372 (1834).

⁵Even though such note has not been disaffirmed on the infant's coming of age, Buzzell v. Bennett, 2 Cal. 101 (1852); Dunlap v. Hales, 2 Jones 381 (1855).

⁶Swasey v. Vanderheyden, 10 Johns. 33 (1813); Henderson v. Fox, 5 Ind. 489 (1854); Fenton v. White, 1 South. 100 (1818); Morton v. Steward, 5 Bradw. 533 (1879).

⁷Earle v. Reed, 10 Metc. 387 (1845).

⁸McMinn v. Richmonds, 6 Yerg. 9 (1834).

⁹Parker v. Baker, 1 Clarke 136 (N. Y. 1839).

¹⁰Rundel v. Keeler, 7 Watts 237 (1838).

¹¹Williams v. Harrison, 3 Salk. 197; Williamson v. Watts, 1 Campb. 352. But see Jones v. Darch, 4 Price 300. And a ratification of such an acceptance after action brought will not support the action, Thornton v. King-

on an acceptance, given after attaining the age of twenty-one years, upon a bill drawn on him during his infancy.¹

§ 271. **Infant Indorser.**—In like manner the indorsement of an infant is voidable.² But notwithstanding the infancy of the indorser, the maker, drawer and acceptor remain liable.³ And this is true, in general, not only as to infancy, but upon all other questions of the indorser's capacity. The maker of a note, or the drawer of a bill of exchange, cannot question the payee's capacity to indorse it.⁴ If, however, the payee's infancy is known both to his indorsee and to the maker of the note, payment by the latter to the indorsee will be no defense to an action brought on the note by the payee's guardian.⁵ But if, on the other hand, the note was transferred without such notice to the indorsee, payment to the father of the infant payee would constitute no defense to an action by the indorsee.⁶ If, indeed, the indorsement of the infant and the note to him have been rescinded, and a new note given by the maker of the original note to the father of the infant payee in consideration of discharge from liability on the old note, it will bar a recovery on the first note.⁷

§ 272. **Defense of Infancy—A Personal Privilege Estoppel.**—The privilege of avoiding an infant's note or indorsement for want of capacity belongs only to him and to his

worth, 2 B. & C. 824 (1824.) But an acceptance may be ratified before action brought, *Hunt v. Massey*, 5 B. & Ad. 902 (1834); S. C., 2 Nev. & M. 109.

¹ Byles 61; Chitty 26; *Stevens v. Jackson*, 4 Campb. 164.

² *Sample v. Morrison*, 7 T. B. Mon. 298 (1828).

³ *Taylor v. Croker*, 4 Esp. 187 (1802); *Grey v. Cooper*, 1 Selw. N. P. 302; S. C., 3 Dougl. 65; *Nightingale v. Withington*, 15 Mass. 272 (1818); *Frasier v. Massey*, 14 Ind. 382 (1860); *Hardy v. Waters*, 38 Me. 450 (1853); *Hastings v. Dollarhide*, 24 Cal. 195 (1864).

⁴ On account of bankruptcy, *Drayton v. Dale*, 2 B. & C. 293 (1823); *Pitt v. Chappelow*, 8 M. & W. 616 (1841); or want of authority in a corporation payee, *Halifax v. Lyle*, 3 Exch. 446 (1849); or want of compliance with the law of a foreign country, where the transfer was made, *Lebel v. Tucker*, 8 B. & S. 833. But see, *contra*, as to maker's right to set up in his defense the indorsee's insanity, *Burke v. Allen*, 29 N. H. 106 (1854).

⁵ *Briggs v. McCabe*, 27 Ind. 327 (1866). And in such case the declaration need not aver a disaffirmance by the infant before such payment, *Id.*

⁶ *Nightingale v. Withington*, 15 Mass. 272 (1818).

⁷ *Willis v. Twambly*, 13 Mass. 204 (1816).

personal representatives.¹ And an infant is not estopped from setting up such defense by reason of having made false representations as to his age.² So, a note signed "A. B., widow," will not estop the maker from showing her coverture in defense.³ Nor is a married woman liable, on a note given by her, for her false representations in the nature of a warranty of her capacity.⁴ But an infant who has obtained a loan through false representations as to his age, has been held liable in equity, so far as to render the debt contracted provable in bankruptcy.⁵ And, in Iowa, an infant is made liable by statute for his false representations as to his age.⁶

It follows from the principle above laid down as to an infant's estoppels, that he cannot be rendered liable in such a case for his contracts, entered into under fraudulent representations as to his age, by merely changing the form of remedy sought into an action for fraud or tort.⁷ If, however, the tort is distinct from all question of contract, he is liable

¹*Hastings v. Dollarhide*, 24 Cal. 195 (1864). And a co-maker with an infant will be liable as a sole maker on discontinuance of the suit as to the infant, *Taylor v. Dansby*, 42 Mich. 82 (1879).

²*Johnson v. Pye*, 1 Keb. 905; S. C., 1 Lev. 169; *Manby v. Scott*, 1 Sid. 109; *Jennings v. Rundall*, 8 T. R. 335; *Bartlett v. Wells*, 1 B. & S. 836 (1862); *Fitts v. Hall*, 9 N. H. 441 (1838); *Conroe v. Birdsall*, 1 Johns. Cas. 127. And such false representations cannot serve as matter for replication at law or in equity to a plea of infancy, *Bartlett v. Wells*, 1 B. & S. 836 (1862).

³*Cannam v. Farmer*, 3 Exch. 698 (1849).

⁴*Wright v. Leonard*, 11 C. B. (n. s.) 258 (1861).

⁵*Ex parte Unity Banking Assoc.*, 3 DeG. & J. 63 (1858). But relief against a marriage settlement by an infant will not be refused him in equity because of his false representation as to his age, which has not misled the party benefited by the settlement, *Nelson v. Stocker*, 4 DeG. & J. 458 (1859).

⁶*Iowa R. C.* 1880 renders an infant liable on all contracts not disaffirmed within a reasonable time (§ 2238), and provides (§ 2239) that "no contract can be thus disaffirmed in cases where, on account of the minor's own misrepresentations as to his majority or from his having engaged in business as an adult, the other party had good reason to believe the minor capable of contracting." And it is not necessary under this statute that the debt should have been contracted in the minor's business, *Jaques v. Sax*, 39 Iowa 367. If, however, the other contracting party knew of the minor's infancy, the infant is not liable on the contract, *Beller v. Marchant*, 30 Iowa 350 (1870).

⁷*Grove v. Neville*, 1 Keb. 778; *People v. Kendall*, 25 Wend. 399 (1841); *Brown v. Durham*, 1 Root 272 (1791); *Wilt v. Welsh*, 6 Watts 9 (1837); *West v. Moore*, 14 Vt. 447 (1842); *Morrill v. Aden*, 19 Ib. 505 (1847); *Vasse v. Smith*, 6 Cranch 226 (1810); *Fitts v. Hall*, 9 N. H. 441 (1838); *Heath v. Mahoney*, 14 N. Y. S. C. 100 (1876).

as in other cases of tort.¹ Thus, he would be liable for retaining a deposit of stakes made with him on an illegal wager contract.² And he might, in a proper case, be held criminally for his wrongful act or representation.³ So, he would be liable on his note given in settlement of damages for wrongfully overdriving a horse,⁴ or in compromise of a bastardy proceeding;⁵ but not on a note given in settlement of an award for a tort committed by him.⁶

§ 273. **Ratification—What Amounts to.**—If a person, after attaining full age, promise expressly to pay a liability contracted by him while a minor, this will amount to a ratification of it.⁷ And he may in this way ratify a note or bill made during his infancy, but the ratifying promise must be express.⁸ In the language of Chief Justice Savage, “a ratification of an infant’s contract should be something more than a mere admission to a stranger that such a contract existed. There should be a promise to a party in interest or his agent, or, at least, an explicit admission of an existing liability from which a promise may be implied.”⁹ A mere declaration of intention is not sufficient for this purpose,¹⁰ nor a mere acknowledgment, or a promise after action brought.¹¹ Where there is a sufficient new promise, the action properly

¹Wallace v. Morss, 5 Hill 391 (1843); Vasse v. Smith, 6 Cranch 226 (1810); Fitts v. Hall, 9 N. H. 441 (1838); Town v. Wiley, 23 Vt. 355 (1851); Nelson v. Stocker, 28 L. J. Ch. 760; 4 DeG. & J. 458 (1859).

²Lewis v. Littlefield, 15 Me. 233 (1839).

³People v. Kendall, 25 Wend. 399 (1841).

⁴Ray v. Tubbs, 50 Vt. 688 (1878).

⁵Gavin v. Burton, 8 Ind. 69 (1856).

⁶Hanks v. Deal, 3 McCord 257 (1825).

⁷Ackerman v. Runyon, 1 Hilt. 169 (1856).

⁸Chitty 27; Wilcox v. Roath, 12 Conn. 550 (1838); Millard v. Hewlett, 19 Wend. 301 (1838); Conklin v. Ogborn, 7 Ind. 553 (1856); Alexander v. Hutcheson, 2 Hawks 535 (N. C. 1823); Petty v. Roberts, 7 Bush 410 (1870); Baker v. Kennett, 54 Mo. 82 (1873).

⁹Goodsell v. Myers, 3 Wend. 479 (1830). So, too, Hoit v. Underhill, 9 N. H. 436 (1838); Bigelow v. Grannis, 2 Hill 120 (1841).

¹⁰Orvis v. Kimball, 3 N. H. 314 (1825).

¹¹Thrupp v. Fielder, 2 Esp. 628 (1798); Ford v. Phillips, 1 Pick. 202 (1822); Proctor v. Sears, 4 Allen 95 (1862); Hinely v. Margaritz, 3 Penna. St. 428 (1846); Conklin v. Ogborn, 7 Ind. 553 (1856); Ring v. Jamison, 2 Mo. App 584 (1876).

lies on the latter and not on the original note.¹ And such promise may be only to pay a part and would then amount, like a part payment, only to a ratification *pro tanto*.² So, where a joint note is paid in part by one of the makers, who is an adult, and the other, an infant, promises, after attaining his full age, to pay the balance, this will be a ratification of the note.³ So, a letter relating to an award of dower and inclosing a payment with the words, "in part toward your right of dower—The remainder I shall forward you in a few days," amounts to a ratification of the award.⁴ So, an agreement, after attaining the age of twenty-one, to pay a note in work or money, is sufficient ratification,⁵ or to pay "when I return from this voyage."⁶ So, too, the following: "I am not prepared for you, but will, without neglect, remit you in a short time," naming neither amount nor payee.⁷ So, an agreement that a bill of exchange should be paid shortly;⁸ or that he "would endeavor to procure the money and send it to him."⁹ But a promise to pay "when he could," is conditional and requires proof of the promisor's ability to pay.¹⁰

§ 274. And, in general, if the new promise fall short of an absolute promise to pay, it will not be equivalent to a ratification. This was held in the case of a letter, saying, "if they will not accept of the proposition, I suppose I will have to pay for them, but I shall do so at my convenience, as it

¹Hodges v. Hunt, 22 Barb. 150 (1856).

²Hinely v. Margaritz, 3 Penna. St. 428 (1846).

³Pierce v. Tobey, 5 Metc. 168 (1842).

⁴Barnby v. Barnby, 1 Pick. 221 (1822).

⁵Edgerly v. Shaw, 25 N. H. 514 (1852).

⁶Martin v. Mayo, 10 Mass. 137 (1813). And this was held not to be a promise conditioned on his safe return, but his estate was held liable notwithstanding his death at sea.

⁷Hartley v. Wharton, 11 Ad. & El. 934 (1840).

⁸Harris v. Wall, 1 Exch. 122 (1847). In this case the rule was laid down by Baron Rolfe that "any act or declaration, which recognizes the existence of the promise as binding, is a ratification. * * * Any written instrument signed by the party, which in the case of adults would have amounted to the adoption of the act of a party acting as agent, will in the case of an infant who has attained his majority amount to a ratification."

⁹Whitney v. Dutch, 14 Mass. 457 (1817).

¹⁰Cole v. Saxby, 3 Esp. 159 (1800); Thompson v. Lay, 4 Pick. 48 (1826); Everson v. Carpenter, 17 Wend. 419 (1837).

will be nothing less than a free gift on my part, the negroes being entirely worthless.”¹ So, a letter saying, “I consider it worthy my attention, but not my first attention—As soon as I can settle my business, I will give it the attention due to it.”² So, it is not a sufficient ratification of an infant’s note to make a will after coming of age directing the payment of all his just debts;³ or to say he would pay “as fast as he got able;”⁴ or that the plaintiff “would get his pay;”⁵ or to tell the holder of an accommodation acceptance to “make yourself easy about it, as I will take care that it is paid;”⁶ or to promise, while under arrest, to pay part of a note, if released.⁷

But the employment of an agent to find a note and pay it, has been held to be a ratification, although the agent did not pay it.⁸ So, the delivery of corn in part payment;⁹ or retaining, for an unreasonable time, goods for which the note was given,¹⁰ and selling part of them.¹¹ So, if an infant receive a note in payment for work done by him and retain it eight months after coming of age, he will be deemed to have ratified the payment and discharged the original debtor.¹² In like manner, if the purchaser of goods die, while still under age, after giving his note for them, the retention of the goods by his administrator will be a ratification of the note.¹³ So, if money due to an infant be paid to his guardian,

¹Dunlap v. Hales, 2 Jones 381 (1855).

²Wilcox v. Routh, 12 Conn. 550 (1838).

³Smith v. Mayo, 9 Mass. 62 (1812).

⁴Chandler v. Glover, 32 Penna. St. 509 (1859).

⁵Hale v. Gerrish, 8 N. H. 374 (1836).

⁶Mawson v. Blane, 10 Exch. 206 (1854), Baron Parke, in this case, p. 210, defining ratification to be “an admission that the party is *liable and bound* to pay the debt arising from a contract which he made when an infant.”

⁷Martin v. Byrom, Dudley 203 (1832).

⁸Orvis v. Kimball, 3 N. H. 314 (1825).

⁹Stokes v. Brown, 3 Pinney 311 (Wis. 1851).

¹⁰Boyden v. Boyden, 9 Metc. 519 (1845); Booth v. McFarland, 2 La. An. 398 (1847).

¹¹Boyden v. Boyden, *supra*.

¹²Delano v. Blake, 11 Wend. 86 (1833).

¹³Shropshire v. Burns, 46 Ala. 103 (1871).

and he receive it from the guardian after arriving at full age, it will ratify the payment.¹

§ 275. **Ratification—Implied.**—Ratification may be implied as well as express. The mere acquiescence of the drawer of an order, without any disaffirmance for several years after coming of age, and after receiving notice of non-payment, will amount to a ratification.² So, failure for an unreasonable time after coming of age to disaffirm a marriage settlement, raises a presumption that it has been ratified.³ Or, as we have seen, retaining the goods, for which the note was given, especially after return of them has been demanded.⁴

But a subsequent promise to pay a note made while under age, is no waiver of errors in a judgment rendered on the note.⁵ Nor is it, in England, a ratification under the Infants' Relief Act to suffer a judgment by default on the note.⁶

Acquiescence, however, for several years in a sale of land made during infancy,⁷ or continuing in possession of land purchased during infancy and expressly promising to pay a note given for it,⁸ or continuing in possession and making a sale of it after coming of age,⁹ is an act of ratification; as, also, taking a property in exchange and retaining it ten years;¹⁰ giving a note for land purchased and mortgaging the land after coming of age;¹¹ or occupying and improving it after coming of age and offering it for sale.¹² But remaining

¹ *Jones v. Phoenix Bank*, 8 N. Y. 228 (1853); *Pursley v. Hays*, 17 Iowa 310 (1864).

² *Thomasson v. Boyd*, 13 Ala. 419 (1848).

³ *Jones v. Butler*, 30 Barb. 641 (1859).

⁴ *Aldrich v. Graves*, 10 N. H. 194 (1839).

⁵ *Goodridge v. Ross*, 6 Metc. 487 (1843).

⁶ *Ex parte Kibble*, L. R. 10 Ch. App. 373 (1875). But where an infant accepted a deed of land containing a clause assuming the payment of a mortgage upon it, suffering a foreclosure without defense has been held in New York to raise the presumption of a ratification, *Flinn v. Powers*, 36 How. Pr. 289 (1868).

⁷ *Belton v. Briggs*, 4 Desaus. 465 (1814).

⁸ *Armfield v. Tate*, 7 Ired. 258 (1847).

⁹ *Hubbard v. Cummings*, 1 Me. 11 (1820).

¹⁰ *Deason v. Boyd*, 1 Dana 45 (1833).

¹¹ *Montgomery v. Whitbeck*, 23 Minn. 173 (1876).

¹² *Robbins v. Eaton*, 10 N. H. 561 (1840).

in possession for six weeks after coming of age,¹ or remaining in possession and submitting to arbitration,² is not sufficient evidence of ratification.

§ 276. **Ratification—Requisites: Writing—Knowledge—Full Age.**—At common law, as will be inferred from what has been already said, ratification of an infant's note or other contract need not be in writing. And even his bond may be ratified by a parol promise.³ But it was provided, in Great Britain, in 1828, by Lord Tenterden's Act that no action should lie "upon a promise to pay a debt contracted during infancy, or a ratification of a contract or promise made during infancy," unless it be made in writing and signed by the party to be bound by it. And this law has been followed by similar statutes in several of the United States.⁴

Moreover, as in other cases, knowledge of the circumstances and of a party's existing freedom from liability are necessary to constitute a good ratification.⁵ Such knowledge will, however, in general be presumed.⁶

A proper ratification of an infant's contract cannot take place until he comes of age;⁷ although it has been held that, as to personal property, an infant may disaffirm his contract during his minority,⁸ especially if it be an executory contract.⁹ And it has been held that the manner of ratification

¹ *Petty v. Roberts*, 7 Bush 410 (1870).

² *Benham v. Bishop*, 9 Conn. 330 (1832).

³ *West v. Penny*, 16 Ala. 186 (1849); *Reed v. Boshear*, 4 Sneed 118 (1856).

⁴ 9 Geo. IV. c. 14. The law is the same substantially in *Kentucky* (1881 G. S. c. 22 § 1); *Stern v. Freeman*, 4 Metc. 309 (Ky. 1863); *Maine* (1871 R. S. c. 111 § 2); *Missouri* (1879 R. S. § 2516); *New Jersey* (1874 Rev. 446 § 7); *Virginia* (1873 Code c. 140 § 1).

⁵ *Kay v. Smith*, 21 Beav. 522. Especially where the infant was only a surety, *Curtin v. Patten*, 11 Serg. & R. 305 (1824). "In the case of an infant who was merely surety, where the contract is absolutely void, it would appear to me to require a confirmation when of full age with an intention of confirming and with the knowledge that the act would be void unless he confirmed it," *Duncan, J.*, in above case, p. 311. But see, as to the knowledge necessary in such case, *Morse v. Wheeler*, 4 Allen 570 (1862).

⁶ *Taft v. Sergeant*, 18 Barb. 320 (1854).

⁷ *Dunton v. Brown*, 31 Mich. 182 (1875); *Corey v. Burton*, 32 *Ib.* 30 (1875).

⁸ *Roof v. Stafford*, 9 Cow. 626, reversing 7 Cow. 179 (1827).

⁹ *Bartholomew v. Finnemore*, 17 Barb. 429 (1854).

should be averred in pleading.¹ And the ratification should be within a reasonable time after the infant comes of age;² and may be presumed, especially in the case of a continuing contract, if there be no disaffirmance within such reasonable time.³

§ 277. **Disaffirmance—Return of Consideration Necessary.**—An infant, on arriving at his majority, cannot disaffirm his contract without returning the consideration received by him, if that is possible.⁴ And this is expressly provided by statute in Iowa.⁵ If an infant has received goods in payment for work done by him, he must, on disaffirming the contract, give credit to the full value of the goods received.⁶ So, if he disaffirms a note given by him for the purchase of property, the proceeds of the property sold must be paid to the holder of the note.⁷ And if, in an exchange of property, that received by him is injured, no re-exchange can take place on his disaffirmance of the contract.⁸ Nor could he retain the property received in exchange and have an action of trover for that given by him.⁹

But it has been held that an offer to return the consideration received by an infant for his indorsement is not

¹ *Williams v. Moor*, 11 M. & W. 256 (1843).

² *Thompson v. Strickland*, 52 Miss. 574 (1876).

³ This has been held in case of a partnership, *Goode v. Harrison*, 5 B. & Aid. 147 (1821); or partnership lease, *Holmes v. Blogg*, 8 Taunt. 35 (1817); or of a note for purchase-money of land conveyed, *Richardson v. Boright*, 9 Vt. 368 (1837).

⁴ *Lynde v. Budd*, 2 Paige 191 (1830); *Hillyer v. Bennett*, 3 Edw. Chy. 222 (1838); *Kitchen v. Lee*, 11 Paige 107 (1844); *Oltman v. Moak*, 3 Sandf. Ch. 431 (1846); *Bailey v. Bainberger*, 11 B. Mon. 113 (1850); *Badger v. Phinney*, 15 Mass. 359 (1819); *Kilgore v. Jordan*, 17 Tex. 341 (1856); *Stuart v. Baker*, *Id.* 417; *Gray v. Lessington*, 5 Bosw. 257 (1857); *Smith v. Evans*, 5 Humph. 70 (1844); *Heath v. West*, 28 N. H. 101 (1853). But see, *contra*, *Dill v. Bowen*, 54 Ind. 204 (1876), as to disaffirmance of a deed by an infant.

⁵ Iowa R. C. 1880 § 2238: "A minor is bound not only by contracts for necessities, but also by his other contracts, unless he disaffirms them within a reasonable time after he attains his majority and restores to the other party all money or property received by him by virtue of the contract and remaining within his control at any time after attaining his majority."

⁶ *Taft v. Pike*, 14 Vt. 405 (1842).

⁷ *Strain v. Wright*, 7 Ga. 568 (1849).

⁸ *Bartholomew v. Finnemore*, 17 Barb. 428 (1854).

⁹ *Farr v. Sumner*, 12 Vt. 28 (1840).

necessary to his disaffirmance.¹ And where a contract for labor and wages has been executed and the wages paid, there can be no subsequent disaffirmance and recovery for additional value of the work performed.² On the other hand, where work has been performed in payment for land conveyed to the infant, a recovery by him of the actual value of the work was afterward allowed.³

And a contract, so far as it remains executory, *e. g.* for a partnership, may always be disaffirmed and money paid on it recovered.⁴ So, too, a contract which is usurious in its terms may be disaffirmed and money paid on it recovered.⁵

Any act showing a clear purpose to disaffirm a contract will amount to a disaffirmance of it.⁶ Thus, a seaman's contract is disaffirmed by desertion;⁷ a conveyance to an infant, by his remaining in possession of the land and conveying it after he comes of age.⁸

§ 278. **Action by Infant—Defense—Pleading.**—As a general rule, infancy creates no incapacity to receive a bill or note, or to sue upon it as payee or holder.⁹ And where the holder is a firm, of which one partner is an infant, he must join with the others in an action brought by the firm.¹⁰ And it is said, in like manner, that where the suit is against a firm on its acceptance, the infant's contract being only voidable, he must be joined.¹¹ The weight of authority seems, however, to sustain an action in such case against the adult parties alone.¹² And an action is plainly sustainable against

¹ *Briggs v. McCabe*, 27 Ind. 327 (1866).

² *Stone v. Dennison*, 13 Pick. 1 (1832).

³ *Medbury v. Watrous*, 7 Hill 110 (1845), overruling *McCoy v. Huffman*, 8 Cow. 84.

⁴ *Corpe v. Overton*, 10 Bing. 252 (1833).

⁵ *Millard v. Hewlett*, 19 Wend. 301 (1838).

⁶ *Chapin v. Shafer*, 49 N. Y. 407 (1872).

⁷ *Vent v. Osgood*, 19 Pick. 572 (1837).

⁸ *Tucker v. Moreland*, 10 Pet. 59 (1836).

⁹ *Holliday v. Atkinson*, 5 B. & C. 501; S. C., 8 D. & Ry. 163.

¹⁰ *Teed v. Elworth*, 14 East 210 (1811); *Slocum v. Hooker*, 13 Barb. 536, reversing 12 Barb. 563 (1851).

¹¹ *Gibbs v. Merrill*, 3 Taunt. 307.

¹² *Byles* 62; *Chitty* 27; 1 *Daniel* 237; *Burgess v. Merrill*, 4 Taunt. 468. So,

the adult makers alone on a joint and several note executed by them and an infant maker.¹

Infancy is available as a defense on the infant's part against all holders;² and is admissible under a plea of *non assumpsit*, although the contrary has been held as to a plea of *nil debet*.³ But other parties, *e. g.* a joint maker,⁴ or subsequent indorser,⁵ cannot avail themselves of the defense, which is, as has been said, the personal privilege of the infant and his representatives.

on other than commercial contracts, *Chandler v. Parker*, 3 Esp. 76 (1800); *Jaffrey v. Frebain*, 5 *Ib.* 47.

¹ *Hartness v. Thompson*, 5 Johns. 160 (1809).

² *Patterson v. Cave*, 61 Mo. 439 (1875).

³ *Young v. Bell*, 1 Cranch C. C. 342 (1806).

⁴ *Reid v. Degerer*, 82 Ill. 508 (1876).

⁵ So held as to the analogous incapacity of coverture, *Haley v. Lane*, 2 Atk. 181 (1741); *Prescott Bank v. Caverly*, 7 Gray 217 (1856); *Erwin v. Downes*, 15 N. Y. 575 (1857); and, also, as to the authority of an agent, *Burrill v. Smith*, 7 Pick. 291 (1828).

CHAPTER IX.

CAPACITY—MARRIED WOMEN.

I. Coverture at Common Law and by Statute.

II. Wife's Separate Estate.

III. Rights of Husband.

I. COVERTURE AT COMMON LAW AND BY STATUTE.

- 279. Common Law Modified by Statute.
- 280. Contracts as to Separate Estate.
- 281. Foreign Statutes—*Lex Loci*.
- 282. Liability on Bills and Notes—Estoppel.
- 283. Recent Statutes Affecting Wife's Bill or Note.
- 284. Commercial Paper for Property Purchased—Money Borrowed.
- 287. Extent of Incapacity—Pleading.
- 288. Indorsement by Wife.
- 289. Contracts as Surety—Accommodation.
- 291. Recent Statutes.
- 292. Accommodation and Express Charge of Separate Estate.
- 293. Ratification after Husband's Death or Divorce.
- 294. Defense of Coverture—When Admissible.
- 295. Contracts While Living Separate.
- 296. Living Separate and with Separate Estate.
- 297. as Sole Trader.
- 298. Deserted by Husband.
- 299. Contracts as Sole Trader.

§ 279. **Common Law Modified by Statute.**—By the rules of the English common law the person and property of the wife are to a great extent absorbed in that of the husband, and her power to make a contract legally binding upon herself or her property is suspended during her coverture. The severity of these rules is wanting in the Roman law, which prevails, with more or less modification, over the whole continent of Europe and in Central and South America.

The common law has, however, been greatly modified by statute both in England and in the United States. In the United States a wife is often made liable upon her contract by statute as a *feme sole*.¹ In New Jersey she may contract as an

¹*Maine* (1871 R. S. 491 § 1); *Mississippi* (1880 Rev. Code § 1167); *South Carolina* (1873 R. S. 482 § 3); *New York* (1884 P. L. c. 381). Such statute has been held in Maine not to be retrospective, *Bryant v. Merrill*, 55 Me. 515 (1868).

unmarried woman, except as to accommodation indorsements and contracts of guaranty and suretyship.¹ In New Hampshire and Georgia the only exceptions to her power to make contracts are contracts as surety or guarantor for her husband.² In Illinois she may contract as an unmarried woman, but cannot make a partnership contract without the consent of her husband, unless he has deserted her, or is idiotic or insane, or a prisoner in the penitentiary.³ In North Carolina she is only enabled to contract for personal necessities, or for the support of her family, or for the payment of antenuptial debts, unless specially licensed and registered as a sole trader.⁴ In Tennessee the wife's separate estate is by statute made liable for contracts for necessities for herself or her minor children.⁵ In Connecticut she may contract "for the benefit of herself, her family, or her separate or joint estate."⁶ In Mississippi the statute formerly made a wife's separate estate liable on contracts by herself and husband or either of them for the benefit of her plantation, or by the wife alone, or by the husband with her consent, for family supplies, education, carriage and horses, and for the improvement of her separate estate.⁷ By the statute now in force

¹*New Jersey* (Act of 1852; 1874 R. S. p. 637 § 5). "Nor shall she be liable on any promise to pay the debt or answer for the default or liability of any other person," *Ib.* It follows that in New Jersey a married woman cannot bind herself as surety by accepting a bill of exchange for the debt of a third person, although the acceptance may afterward come to the hands of a *bona fide* holder, *Cooley v. Bancroft*, 14 Vroom 363 (1881); or signing or indorsing an accommodation note, *Van Kirk v. Skillman*, 5 Vroom 109 (1870); *Perkins v. Elliott*, 7 C. E. Green 127 (1871); S. C., 8 *Ib.* 526; *Peake v. Labaw*, 6 *Ib.* 269 (1871). And even in the hands of a *bona fide* holder for value such an instrument would not be binding upon her, *Cooley v. Bancroft*, *supra*.

²*New Hampshire* (1878 G. L. 435 § 12); *Georgia* (R. C. § 1783). Thus a note given in Georgia by a married woman for property purchased by her is valid and will sustain an action at law, *Davis v. Moorfield*, 40 Ga. 185 (1869). But a wife's note given for a debt of her husband is not binding on her even in the hands of a *bona fide* holder, and although it contains a recital that it was given for advances to her, *March v. Clark*, 9 Fed. Rep. 753 (1882). But see, *contra*, *Perkins v. Rowland*, 69 Ga. 661 (1882).

³*Illinois* (1880 R. S. 592 § 6).

⁴*North Carolina* (1873 Bat. Rev. 590 § 17).

⁵*Tennessee* (1871 Comp. S. § 2486d).

⁶*Connecticut* (G. S. 417 § 9). But a joint note of herself and husband is not presumptively such a contract, *Way v. Peck*, 47 Conn. 23 (1879).

⁷*Mississippi* (Code of 1857 c. 40 Art. 25; 1871 Rev. Code § 1780); *Pendleton v. Galbreath*, 45 Miss. 43 (1871). But she had no power under this act

all disabilities of coverture are removed.¹ In Pennsylvania she may have a separate estate not liable for her husband's debts. It will be liable, however, for family supplies necessarily purchased, and for debts contracted by herself.²

In Indiana she may contract as an unmarried woman, if her husband is insane.³ So, in Tennessee, if her husband is found insane by the verdict of a jury.⁴ In Maine she may contract as an unmarried woman, if she comes from another State or country and is not living with her husband.⁵ So, in Connecticut, if she is abandoned by her husband, her position and capacity are those of a *feme sole*.⁶ In West Virginia a wife living separate from her husband has the capacity of a sole trader.⁷ So, in North Carolina, if living separate under a decree of court or a deed of separation.⁸ So, in Pennsylvania, as far as the disposition of her property

to render the estate of a minor ward liable, *McGavock v. Whitefield*, 45 Miss. 452 (1871). Nor her own estate leased to and in the possession of her husband, *Grubbs v. Collins*, 54 *Ib.* 485 (1877). In equity she will not be allowed, however, to retain the consideration, *e. g.* land purchased, and avoid the note, *Hendrick v. Foote*, 57 Miss. 117 (1879).

¹1880 Rev. Code § 1167.

²*Pennsylvania* (Laws of 1848 p. 536; *Purd. Dig.* 1872 p. 1005). But so far as relates to her debts, ante-nuptial debts only are intended by this act, *Mahon v. Gormley*, 24 Penna. St. 80 (1854); *Glyde v. Keister*, 32 *Ib.* 85; *Bear v. Bear*, 33 *Ib.* 529.

³*Indiana* (1861 P. L. 182). But where the husband was sane the wife's note for a loan to her was held to be void although a collateral mortgage made by herself and husband was held to be valid, *Gregory v. Van Voorst*, 85 Ind. 108 (1882). On the other hand, the note of both, secured by her mortgage on land conveyed to her, and in consideration of said conveyance, is not binding on her, *Martin v. Cauble*, 72 *Ib.* 67 (1880). Nor is she liable on a joint note given with another as surety for her husband, *Daudistel v. Bennighof*, 71 *Ib.* 389 (1880). But a mortgage as surety for her husband containing a covenant to pay the debt, not secured by a note, was held to be valid in *Sperry v. Dickinson*, 82 *Ib.* 132 (1882). Under the Act of 1879, p. 160, and no longer in force, a married woman could bind herself by her note given for personal property purchased by her, *Wulschner v. Sells*, 87 Ind. 71 (1882); *Rothschild v. Raab*, 93 *Ib.* 488 (1883); or for money borrowed to carry on her separate business, *Wallace v. Rowley*, 91 *Ib.* 586 (1883); or by her indorsement of a note, *Mathers v. Shank*, 94 *Ib.* 501 (1883).

⁴*Tennessee* (1871 Comp. S. § 2486).

⁵*Maine* (1871 R. S. 491 § 10).

⁶*Connecticut* (1875 G. S. 187). So, in *North Carolina* (1873 Bat. Rev. 590 24), as also if he "maliciously turn her out of doors."

⁷*West Virginia* (1879 R. S. c. 122 § 13). And a joint note of herself and husband for a debt of the husband to his firm would be binding on her separate estate, *Dages v. Lee*, 20 W. Va. 584 (1882).

⁸*North Carolina* (1873 Bat. Rev. 590 § 23).

goes, whenever her husband "from drunkenness, profligacy, or other cause, shall neglect or refuse to provide for his wife, or shall desert her."¹ In Ohio and Vermont the statute enables her to acquire the capacity of a sole trader by order of the court, if her husband "deserts her, or from intemperance or other cause becomes incapacitated, or neglects to provide for his family."² In Kentucky she may make contracts and convey her property as a *feme sole* under the order of the court, if her husband abandons her or fails to support her.³

In Kansas she may carry on business as a *feme sole* with all the liabilities and capacity of such.⁴ In California she may become a sole trader by judgment of the court.⁵ In Michigan and some other States she may be relieved altogether from the disabilities of coverture by order of court.⁶

§ 280. **Contracts as to Separate Estate—Statutes.**—In Massachusetts, New York and some other States she has unrestricted power to make contracts like an unmarried woman as to her separate estate.⁷ In Ohio she may contract

¹*Pennsylvania* (1872 *Purd. Dig.* 701 § 22).

²*Ohio* (1880 R. S. § 3111); *Vermont* (1880 R. S. § 2328). So, too, in *Vermont*, pending the husband's confinement in the State prison (§ 2334).

³*Kentucky* (1881 G. S. 520 § 5). So, in case of abandonment only, in *Missouri* (1879 R. S. § 3284).

⁴*Kansas* (1881 *Comp. L.* § 3139).

⁵*California* (1876 *Civil Code* § 1181). But her note, though given for a consideration in itself sufficient, is of no force unless the statutory requirements are followed, *Belloc v. Davis*, 38 *Cal.* 242 (1869).

⁶*Alabama* (1876 *Code* § 2731); *Kentucky* (1881 G. S. 521 § 6); *Michigan* (1872 *Comp. L.* 1474 § 4, 1477 § 25). So, in *Louisiana*, to the extent of borrowing money and contracting and securing debts for her separate benefit and advantage (1876 R. S. § 1713). And where notes are given in accordance with this act, the burden of proof does not lie on the holder to show that the note was given for the maker's separate benefit, *Miller v. Wisner*, 22 *La. An.* 457 (1870). Nor can the maker show that it was not so, in contradiction of her judicial admissions, *Feltus v. Blanchin*, 26 *Ib.* 401 (1874). Notes exceeding \$1,500 must be authorized by a district judge, those below that sum by a parish judge, *Stufler v. Puckett*, 30 *Ib.* 811 (1878).

⁷*Kansas* (1881 *Comp. L.* § 3137); *Massachusetts* (1882 *Pub. Stats.* 818 § 10); *New York* (Laws of 1860 c. 90 § 2; Laws of 1884 c. 351). So, in *Indiana*, while the act of 1879 remained in force (1879 P. L. 160 § 3). So, in *Rhode Island* (1882 *Pub. Stats.* 422 §§ 4, 6), where, however, the joinder of the husband is required to affect certain enumerated kinds of property. The New York act has been held to be applicable to the renewal after its passage of a note made before it was passed, *Barton v. Beer*, 35 *Barb.* 78 (1861). And

for the benefit of her separate estate.¹ In Mississippi her separate estate is liable for her ante-nuptial debts, but her husband is not.² In Wisconsin she may sue and be sued as to her separate property.³ And in many States she may convey her separate property.⁴ But in Delaware, as well as in other common law States where no statutory provision exists, she cannot convey her separate property without the co-operation of her husband.⁵

Many States now provide by statute for the acquiring and holding by the wife of separate property not liable for the debts of her husband, according to the principle already established in equity.⁶ Thus, in Connecticut, a wife's real estate purchased with her own earnings is made her separate prop-

she will be liable to an accommodation indorser on a note given for her separate estate or business, although the money was not applied to it, *Scott v. Otis*, 25 Hun 33 (1881). But in a note payable to her husband and discounted for him, there is no presumption, even from her having a separate estate, that the note was given for the benefit of such estate, but this fact must be proved, *Saratoga Co. Bank v. Pruyn*, 90 N. Y. 250 (1882). And her separate estate in a life insurance policy will not be bound by a note given jointly with her husband, although he represented it as liable, *Bloomingtondale v. Lisberger*, 24 Hun 355 (1881). So she may make contracts in relation to her separate estate in *New Hampshire* (1842 R. S. p. 296; 1878 G. L. p. 435). But money borrowed by her for the purpose of purchasing a separate estate is not sufficient to make a note given by her for such loan binding on her estate, *Ames v. Foster*, 42 N. H. 381 (1861).

¹*Ohio* (1880 R. S. § 3108). And an intention to bind her separate estate by a note given as surety for her husband, will be presumed from her having such estate, *Hershizer v. Florence*, 39 Ohio St. 516 (1883).

²*Mississippi* (1857 Code c. 40 Art. 25; 1871 Rev. Code § 1780).

³*Wisconsin* (1878 R. S. § 2345).

⁴*Illinois* (1880 R. S. 592 § 9); *Iowa* (1880 McClain's Stats. § 2202); *Kansas* (1881 Comp. L. § 3137); *Maryland* (1878 Rev. Code 482 § 23); *Massachusetts* (1882 Pub. Stats. 818 § 1); *Maine* (1871 R. S. 491 § 1); *South Carolina* (1873 R. S. 482 § 2); *Wisconsin* (1878 R. S. § 2342).

⁵*Delaware* (1874 Rev. Code 478).

⁶*Alabama* (1876 Code § 2705); *California* (1876 Code Civ. § 5162); *Delaware* (1874 Rev. Code 478); *Indiana* (1879 P. L. 160); *Iowa* (McClain's Stats. § 2202); *Kansas* (1881 Cowp. L. § 3136); *Maryland* (1878 Rev. Code 482 § 20); *Massachusetts* (1859 G. S. c. 108); *Michigan* (1872 Com. L. p. 1477 § 25); *Minnesota* (1878 Stats. 769 § 1); *Missouri* (1879 R. S. § 3296); *New Hampshire* (1878 G. L. 434 § 1); *New Jersey* (Act of 1852; 1874 R. S. 636 § 1); *New York* (1848 P. L. 307; 1849 P. L. 525); *Pennsylvania* (1848 P. L. 536; 1872 Purd. Dig. 1005). And property acquired by her while deserted by her husband, is her separate property in Pennsylvania, *Starrett v. Wynn*, 17 Serg. & R. 130 (1827). But a note made to the wife at the husband's request, and for a consideration proceeding from him, is within the exception of the Massachusetts act as to gifts from husband to wife, *Towle v. Towle*, 114 Mass. 167 (1873).

erty by statute.¹ And, in Missouri, while her husband fails to support her, her earnings are her separate property.² A more comprehensive and detailed statement of these and similar statutes is to be sought rather in works relating to the special subject. Cases based on the recent statutes, however, and illustrating the change in this branch of the law, which has now become largely statutory, have been freely cited throughout this chapter.

§ 281. **Foreign Statutes—Lex Loci.**—By the English statute of 1870, a wife's earnings, her distributive share of property received under the intestate laws, and legacies and gifts to her up to the amount of £200, are her separate property.³ And by the Act of 1874 the husband is now liable in England for his wife's debts and torts while sole, only so far as he has received assets from her.⁴

By foreign law, as a rule, a wife's capacity to make, accept or indorse commercial paper is in general the same as that of an unmarried woman. By the German Exchange Law she has power to make bills of exchange.⁵ In Hungary no women are competent to make bills or notes unless registered as merchants.⁶ In France and other countries governed by the Code Napoleon a woman's commercial paper amounts only to an acknowledgment of indebtedness, unless she is engaged in trade.⁷ In Russia all women,

¹*Connecticut* (1875 G. S. 186).

²*Missouri* (1879 R. S. § 3286).

³33 and 34 Vict. c. 93. In *Upper Canada*, by the act of 1872, she may bind her separate estate by a note or indorsement given for the accommodation of her husband, *Frazee v. McFarland*, 43 U. C. Q. B. 281 (1878), especially if reference be made in the note to such estate, *Consolidated Bank v. Henderson*, 29 U. C. C. P. 549 (1879).

⁴37 and 38 Vict. C. 50, repealing 33 and 34 Vict. c. 93 § 12, which had released the husband from all liability for such debts. These acts applied in terms only to marriages taking effect after their passage, viz., August 9th, 1870, and July 30th, 1874, respectively.

⁵Thöl's Wechselrecht 106. This is subject to local restrictions requiring consent or co-operation of the husband.

⁶*Hungary* (Exch. Law 1861 Art. 9).

⁷*France* (Code Napoleon 1807 Art. 113); *Greece* (1835 Code Com. Art. 113); *Haiti* (1826 Code Com. Art. 111); *Italy* (1865 Code Com. Art. 199); *Monaco* (1818 Code Com. Art. 103); *Roumania* (1840 Code Com.); *Venezuela* (1862 Code Com. Art. 8); *San Domingo* (1844 Code Napoleon Art. 113).

except those engaged in trade, are incompetent to make bills of exchange or notes, without the consent of husband or parents.¹ And in Servia commercial paper signed by a woman, without the consent of husband or parent in the manner prescribed by law, is a mere acknowledgment of debt.² In the Argentine Republic the husband acquires by marriage the right to indorse bills of exchange drawn payable to his wife before marriage.³ It will be observed that the foregoing statutes make no distinction between married and unmarried women. This was also the case, in great degree, with the Roman law, from which they are in part derived.

What law governs a bill of exchange or promissory note in this respect is considered properly and more fully in another part of this work. It has been held in Mississippi that a married woman's note, made in Tennessee to an agent in Mississippi for supplies for the maker's plantation in Mississippi, is enforceable there, although void in Tennessee.⁴ On the other hand, Mississippi courts have refused to enforce a note made in Louisiana by a husband and wife residing in Mississippi, although the statute of Louisiana, which was strictly construed as contrary to the common law, allowed a wife's note.⁵

§ 282. **Common Law Liability on Bills and Notes—Estoppel.**—By the English common law, and wherever it is in force without statutory modification, the bill of exchange, promissory note, or check of a married woman is legally void;⁶ although in England a married woman has been held

¹*Russia* (1862 Exch. Law Art. 546).

²*Servia* (1860 Code Com. Arts. 76-78).

³*Argentine Republic* (Code Com. 1862 Art. 807).

⁴*Shacklett v. Polk*, 51 Miss. 378 (1875). This is an apparent exception to the general rule that the law of the place of contract governs.

⁵*Bank of Louisiana v. Williams*, 46 Miss. 618 (1872). The statutory authority in Louisiana was contained in the charter of the bank to which the note was given.

⁶*Byles* 65; 1 *Daniel* 238; *Robertson v. Bruner*, 24 Miss. 242 (1852); *Van Steenburgh v. Hoffman*, 15 Barb. 28 (1853); *Bloomington v. Lisberger*, 24 Hun 355 (1881); *Griffith v. Clark*, 18 Md. 457 (1862); *Kenton Ins. Co. v.*

liable to arrest, as if sole, as the drawer of a bill of exchange.¹ But a married woman cannot be estopped from setting up the disability of coverture by reason of having signed a note as "A. B., widow."² Nor will she be estopped by reason of her fraud or false representation, where she has executed a deed in her maiden name.³ This is true also of a judgment bond.⁴

§ 283. **Recent Statutes as Affecting a Wife's Bill or Note.**—In New York, under the Acts of 1860 and 1861, an accommodation note made by a married woman is void.⁵ In Mississippi, under the present statute, the wife's separate estate is not liable for the payment of a note made jointly with her husband, unless made by her in the course of her separate business or charging the separate estate.⁶ In Arkansas a married woman's note or bill of exchange, not given for her personal benefit or for that of her separate property, is void.⁷ In Pennsylvania it is held that the incapacity of a married woman is not changed by the statute of 1848, except as to ante-nuptial debts and those contracted in the management of her separate property or for the purchase of family

McClellan, 43 Mich. 564 (1880); *Reed v. Buys*, 44 *Ib.* 80 (1880); *Howe v. Wildes*, 34 Me. 566 (1852); *Mahon v. Gormley*, 24 Penna. St. 80 (1854); *Snow v. Mather*, 52 Tex. 650 (1880); *Hodges v. Price*, 18 Fla. 342 (1881); *Pippen v. Wesson*, 74 N. C. 437 (1876); *Goodhue v. Barnwell*, Rice Eq. 198 (1838); *Phillips v. Hagadorn*, 12 How. Pr. 17 (1855); *Simpers v. Sloan*, 5 Cal. 457 (1855); *Bryant v. Merrill*, 55 Me. 515 (1868), until Me. Stat. 1866 c. 52; *Higgins v. Willis*, 35 Ind. 371 (1871), until Act of 1879 (P. L. 160); *Wooden v. Wampler*, 69 Ind. 88 (1879); *Thomas v. Passage*, 54 *Ib.* 106; *Williams v. Wilber*, 67 *Ib.* 42; *Daudistel v. Bennighof*, 71 *Ib.* 389 (1880), the note in this case having been made in 1869; *Fry v. Hamner*, 50 Ala. 52 (1873); *Davis v. Fry*, 7 Sm. & M. 64 (1846). This case held that the Act of 1839 (Laws of 1839 p. 72) simply gave a married woman the right to acquire and hold separate property, and did not change the common law rule as to her want of power to make contracts. Complete power is, however, now given by statute (1880 R. C. § 1167).

¹*Jones v. Lewis*, 7 Taunt. 54 (1816); S. C., 2 Marsh. 385.

²*Cannam v. Farmer*, 3 Exch. 698 (1849). So, a recital that the note was given for advances to her will not estop her from showing that it was for the accommodation of her husband and therefore void, *March v. Clark*, 9 Fed. Rep. 753 (1882); and parol evidence is admissible to show the undisclosed coverture of the maker of a note, *Mount v. Zisken*, 7 N. J. Law J. 71.

³*Lowell v. Daniels*, 2 Gray 161 (1854).

⁴*Keen v. Coleman*, 39 Penna. St. 299 (1861).

⁵*Scudder v. Gori*, 3 Robt. 661 (1864); S. C., 18 Abb. Pr. 223.

⁶*Nelson v. Miller*, 52 Miss. 410 (1876); Miss. Code 1871 § 1780.

⁷*Conner v. Abbott*, 35 Ark. 365 (1880).

necessaries. And other contracts by her in the form of commercial paper or otherwise are invalid.¹ In California the wife is held not to be personally liable on a joint note and mortgage security made by herself and husband.² In New York the Act of 1848, it is held, did not render a married woman liable for goods purchased by her merely because she had a separate estate.³ But under the law of New York, as it now is, a married woman having a separate estate is liable on her note given for the purchase of a sewing machine;⁴ but not on a note for goods purchased for the family, notwithstanding her promise of payment in the latter case, made after her husband's death.⁵ In Louisiana a married woman's note, authorized by her husband and given for the support of the family, is binding.⁶ But she is not liable on the joint note of herself and husband, notwithstanding that property acquired after marriage is held by them in community.⁷ In Mississippi it has been held that a married woman's note given for slaves purchased on credit was not binding upon her;⁸ although a surety on such a note would still be liable.⁹ And in Texas a woman has been held as maker on such a note given jointly with her *supposed* husband.¹⁰

§ 284. **Commercial Paper for Property Purchased—Money Borrowed.**—A wife's note given for land conveyed to her is not binding upon her at common law.¹¹ Nor is her separate

¹ *Mahon v. Gormley*, 24 Penna. St. 80 (1854).

² *Brown v. Orr*, 29 Cal. 120 (1865).

³ *Bass v. Bean*, 16 How. Pr. 93 (1858); *Arnold v. Ringold*, *Ib.* 158. This act and the N. Y. Act of 1849 confer no new capacity to contract with personal liability, *Switzer v. Valentine*, 4 Duer 96 (1854).

⁴ *Williamson v. Dodge*, 5 Hun 497 (1875).

⁵ *Smith v. Allen*, 1 Lans. 101 (1869).

⁶ *Fenn v. Holmes*, 6 La. An. 199 (1851); *La. C. C.* § 2409.

⁷ *Wiley v. Hunter*, 2 La. An. 806 (1847).

⁸ *Pollen v. James*, 45 Miss. 129 (1871); *Whitworth v. Carter*, 43 *Ib.* 61 (1870).

⁹ *Whitworth v. Carter*, *supra*.

¹⁰ *George v. Stevens*, 31 Tex. 670 (1869).

¹¹ *Howe v. Wildes*, 34 Me. 566 (1852); *Dunning v. Pike*, 46 Me. 461 (1859); *Carpenter v. Mitchell*, 50 Ill. 470 (1869); *Pemberton v. Johnson*, 46 Mo. 342 (1870); *Dollner v. Snow*, 16 Fla. 86 (1878). So, in Texas a note by husband and wife for annuity property is voidable by the wife or her administrator, *Snow v. Mather*, 52 Tex. 650 (1880).

estate liable on a note given for such consideration jointly with her husband, unless it is expressly charged.¹ And such a note by husband and wife has been held to be the contract of the husband alone.² So, where a wife is living with her husband, her note for goods purchased by her for household supplies is void, although she may have promised after her husband's death to pay them.³ It has, however, been often held, as we shall see, that an intention to charge her separate estate or the fact of a separate benefit to her estate may be presumed from her mere act in making the purchase. But it has been held in Louisiana that her note, made without authorization of her husband, for property bought by her during marriage, where there is no proof that the property enured to her separate benefit, or that she was administering her paraphernalia, or even had any separate property, cannot render her liable.⁴ Where, however, a note given by her for the purchase of land is void, as has been said, and she does not elect to pay for the land, it may be subjected to a sale to satisfy the vendor's lien.⁵ And a court of equity would in no case permit her to retain the land or other property purchased and disclaim all liability to pay for it.⁶

A wife cannot at common law bind herself by joint note with her husband for money received by her.⁷ Nor is she liable on her note for money borrowed for the purchase of a piece of land.⁸ Nor on the joint note of herself and husband for such consideration, where there is no proof that the money was applied to her use and benefit or the benefit of her separate estate.⁹ So, she is not liable on such joint

¹ *Kimm v. Weippert*, 46 Mo. 532 (1872).

² *Doyle v. Orr*, 51 Miss. 229 (1875).

³ *Smith v. Allen*, 1 Lans. 101 (1869).

⁴ *Graham v. Thayer*, 29 La. An. 75 (1877).

⁵ *Johnson v. Jones*, 51 Miss. 860 (1876); *McDuff v. Beauchamp*, 50 Miss. 531 (1874); *Nicholson v. Heiderhoff*, 50 Miss. 56 (1874); *Gordon v. Manning*, 44 Miss. 757 (1870); *Farr v. Wright*, 27 Tex. 96 (1863).

⁶ *Hendrick v. Foote*, 57 Miss. 117 (1879).

⁷ *Thatcher v. Cannon*, 6 Bush 541 (1869).

⁸ *Riley v. Pierce*, 50 Ala. 93 (1873).

⁹ *Stokes v. Shannon*, 55 Miss. 583 (1878); *Conrad v. Le Blanc*, 29 La. An. 123 (1877). Such a note, to be binding on the wife, requires a separate con-

note reciting that it was given for money loaned to her for the purpose of purchasing family supplies and necessities, especially where the money was not shown to have been actually so used.¹

And it has even been held in Louisiana that a wife could not be held liable after her husband's death on their joint note given during their marriage for the purchase of land, which stood in the wife's name but was really community property.² So, the wife's separate estate is not liable for a note made by her jointly with her husband for the tuition and board of their daughter.³

§ 285. In New York, since the statutes of 1860 and 1861, a married woman may contract as if she were unmarried.⁴ And she may give a valid note for her release from a contract for the sale of a farm.⁵ So, her note given in part for goods purchased by her is so far valid, although partly given for a debt of her husband and to that extent invalid.⁶ The common law presumption that a married woman's note is invalid still prevails in New York, and the holder of such note must show that it was given by her as a sole trader, or for her separate benefit, or on the credit of her separate estate.⁷ And where she transacts business through her husband as agent, a note made by her husband, in her name but not in her business or for her separate benefit, will not be binding upon her, although it had been represented by the husband

sideration to her, and no consideration between herself and husband, will be sufficient to bind her, *Reed v. Buys*, 44 Mich. 80 (1880). So, a joint note given by husband and wife to pay a judgment entered against both, is not binding on her, she being ignorant of the purpose for which it was given and receiving no separate consideration for it, *Schlattner v. Nickodemus*, 51 *Ib.* 626 (1883). So, too, her individual note requires a separate consideration to her which will not be presumed, *Kenton Ins. Co. v. McClellan*, 43 *Ib.* 564 (1880).

¹ *Viser v. Scruggs*, 49 Miss. 705 (1874); *Sharp v. Proctor*, 5 Bush 396 (1869); *Gatewood v. Bryan*, 7 Bush 509 (1870); *Hutchinson v. Underwood*, 27 Tex. 255 (1863); *McMahon v. Lewis*, 4 Bush 138 (1868).

² *Millandon v. Carson*, 25 La. An. 380 (1873).

³ *Collins v. Underwood*, 33 Ark. 265 (1878).

⁴ *Foster v. Conger*, 61 Barb. 145 (1871).

⁵ *Willsey v. Hutchins*, 10 Hun 502 (1877).

⁶ *Spencer v. Humiston*, 9 Hun 71 (1876).

⁷ *Hallock v. De Mum*, 2 Thomp. & C. 350 (1873).

to be in her business and for her benefit and had come to the hands of a *bona fide* owner for value.¹

Since the recent statutes above referred to a married woman is liable in Massachusetts on her acceptance of a bill of exchange given in consideration of debts due from her to the drawer.² And it has been held in Texas, in apparent disregard of the common law presumption, that the holder of a married woman's note is, without proof of its consideration, such a creditor as to entitle him to letters of administration on her estate.³ In Massachusetts it has been held that a married woman's note given for money loaned her is now binding upon her, although the money was borrowed with the intention of using it to assist her husband and this was known to the lender.⁴ So she has been held liable on a partnership note, as a member of the firm, her husband not being a member.⁵ This has also been held to be the existing law in New Jersey.⁶ In Mississippi a married woman is liable upon a note made by her before marriage for debts contracted at the time.⁷ And in New Hampshire it has been held that a woman is liable upon her note made after marriage in renewal of an earlier note made while unmarried.⁸

§ 286. In New York a married woman having separate property is liable for a note given by her for a sewing machine purchased by her in the presence of her husband, he refusing to have anything to do with it and she promising to pay for it.⁹ In Massachusetts her note given for real estate purchased for her separate property is now binding on her.¹⁰ So, in Ohio, a joint note of husband and wife for real estate pur-

¹ *Bogert v. Gulick*, 65 Barb. 322 (1873); S. C., 45 How. Pr. 385.

² *Pierce v. Kittredge*, 115 Mass. 374 (1874).

³ *Nickelson v. Ingram*, 24 Tex. 630 (1860).

⁴ *Wilder v. Richie*, 117 Mass. 382 (1875).

⁵ *Plumer v. Lord*, 5 Allen 460 (1862).

⁶ *Merritt ads. Day*, 9 Vroom 32 (1875).

⁷ *Travis v. Willis*, 55 Miss. 557 (1878).

⁸ *Shannon v. Canney*, 44 N. H. 592 (1863).

⁹ *Williamson v. Dodge*, 5 Hun 497 (1875).

¹⁰ *Estabrook v. Earle*, 97 Mass. 302 (1867).

chased and put in her name, the husband having become insolvent.¹ So, in Massachusetts, her note for work done on lands held by herself and her husband as tenants in common.² In Mississippi, where she gives notes partly for supplies for her plantation and in part for her husband's debts, and secures them by mortgage on her land, her estate will be liable to the extent of the supplies furnished and the income of her land will be liable for the husband's debts secured.³ And in West Virginia in an attempt to enforce the joint bond of a husband and wife against the wife's land, it was held that she might act as a *feme sole* in respect to all her personal estate and to the rents and profits of her real estate.⁴

In Louisiana she may make a valid note by authorization of her husband or by order of court.⁵ But where she has executed such note under authority of the court, she may set up in defense that the note was obtained by fraud and was given for her husband's debt.⁶ And she may even prove by parol in such case that no money was actually borrowed by her and that the whole consideration was the debt of her husband.⁷

§ 287. **Extent of Incapacity—Pleading.**—Where husband and wife have executed a joint note on which the wife is liable, their subsequent divorce will not relieve her from liability.⁸ If, however, a married woman's note is utterly void, although in its form negotiable and in compliance with mercantile law, it will not operate as payment of a valid debt for which it was given.⁹ On the other hand, although such

¹Avery v. Vansickel, 35 Ohio St. 270 (1879).

²Burr v. Swan, 118 Mass. 588 (1875).

³Dibrell v. Carlisle, 48 Miss. 691 (1873).

⁴Radford v. Canvile, 13 W. Va. 573 (1878).

⁵Bank of Lafayette v. Bruff, 33 La. An. 624 (1881). And a note made after the husband's death by an attorney acting under the joint power of attorney of husband and wife, made during coverture with the required authorization of a judge, is not binding on her without separate benefit or ratification by her, Calhoun v. Mechanics' Bank, 30 La. An. 772 (1878).

⁶Barth v. Kaso, 30 La. An. 940 (1878).

⁷Hall v. Wyche, 31 La. An. 734 (1879).

⁸Schaeffer v. Ivory, 7 Mo. App. 461 (1879). But see Hooton v. Ransom, 6 Ib. 19 (1878).

⁹Little v. American, &c., Sewing Machine Co., 67 Ind. 67 (1879).

note may be void at law, a mortgage by the wife of her separate estate given to secure it may be valid.¹

And it has been held that a married woman's note is not *per se* void and subject to be disposed of as such on demurrer, but the disability must be pleaded as a defense.² And where she has failed to plead it, a motion in arrest of judgment will not be sustained as to her separate property, (although it might be sustained as to community property) the declaration on the note not having averred that she was a married woman.³ Where one of several makers of a joint note pleads her coverture, it has been held that the plaintiff may discontinue as to her and proceed against the others.⁴ And where the declaration or petition contains no averment of separate benefit or that the note was given for necessities, it seems that a judgment rendered against her by default may be opened, the note in this case being a joint one of husband and wife.⁵

§ 288. **Indorsement by Married Woman.**—At common law a married woman is not liable upon her indorsement of a bill of exchange or note.⁶ And many American statutes, which provide for the separate property of the wife, give her no separate power of disposal. This is the case in New Jersey with the Married Woman's Act of 1852.⁷ But under recent statutes a married woman having a separate estate is generally liable upon her indorsement.⁸

At common law her indorsement did not even effect a transfer of the paper.⁹ And this is still so in some States,

¹ *Brookings v. White*, 49 Me. 479 (1862).

² *Hughes v. Brown*, 3 Bush 660 (1868).

³ *Phelps v. Brackett*, 24 Tex. 236 (1859).

⁴ *Shipman v. Allee*, 29 Tex. 17 (1867).

⁵ *Trimble v. Miller*, 24 Tex. 214 (1859); *Covington v. Burleson*, 28 *Ib.* 368 (1866); even though entered by consent, *Bullock v. Hayter*, 24 Tex. 9 (1859).

⁶ *Barlow v. Bishop*, 3 Esp. 266; S. C., 1 East 432.

⁷ *Naylor v. Field*, 5 Dutch. 287 (1861); *Vreeland v. Schoonmaker*, 1 C. E. Green 512 (1863); *Belford v. Crane*, *Ib.* 265; *Vreeland v. Ryno*, 11 *Ib.* 160 (1875).

⁸ *Frank v. Lilienfeld*, 33 Gratt. 377 (1880).

⁹ *Barlow v. Bishop*, 1 East 432; S. C., 3 Esp. 266; *Tillinghast v. Holbrook*,

if the indorsement be made without the husband's consent.¹ In other States an indorsement, made by the wife after her marriage to confirm her previous transfer of a note by delivery, passes a perfect legal title.² And in New York, before the act of 1848, a wife might indorse in her maiden name a note made to her before marriage, if the authority of her husband could be inferred from her being a sole trader or from other circumstances.³ And it seems that even where a married woman's indorsement does not render her personally liable, it may still be sufficient to effect a valid transfer.⁴ And an indorsement by the wife, of a note made to her for property purchased from her husband, would put the note out of reach of an attachment at suit of the husband's creditors.⁵ So, a wife may with the consent of her husband make a good equitable assignment by delivery of a note and mortgage executed to her.⁶ And where a bill or note is made payable to a married woman, her indorsement with the authority or consent of her husband effects a valid transfer at common law;⁷ especially if the husband be present when the transfer is made.⁸

And where she has indorsed and transferred a note made to her, payment may be made to the holder until her presumed authority is revoked.⁹ The husband's authority to his wife to indorse such a note may be presumed from his conduct or from a subsequent ratification of her act.¹⁰ So,

7 R. I. 230 (1862). But such indorsement effects a sufficient transfer in Mississippi, *Harding v. Cobb*, 47 Miss. 599 (1873).

¹ *Hemmingway v. Matthews*, 10 Tex. 207 (1853).

² *Guptill v. Horne*, 63 Me. 405 (1874).

³ *Miller v. Delamater*, 12 Wend. 433 (1834).

⁴ *Moreau v. Branson*, 37 Ind. 195 (1871).

⁵ *Way v. Pierce*, 51 Vt. 326 (1878).

⁶ *Baker v. Armstrong*, 57 Ind. 189 (1877).

⁷ *Prestwick v. Marshall*, 4 C. & P. 594; S. C., 7 Bing. 565; *Smith v. Marsack*, 6 C. B. 486; *Stevens v. Beals*, 10 Cush. 291 (1852); *Mudge v. Bullock*, 83 Ill. 22 (1876); *McClain v. Weidemeyer*, 25 Mo. 364 (1857); *Nimes v. Bigelow*, 45 N. H. 343 (1864).

⁸ *Menkens v. Heringhi*, 17 Mo. 297 (1852).

⁹ *George v. Cutting*, 46 N. H. 130 (1865).

¹⁰ *Prince v. Brunatte*, 1 Bing. N. C. 435; *Mudge v. Bullock*, 83 Ill. 22 (1876).

his consent may be presumed, where the note in question has been given to her for a bill of exchange drawn by him payable to her order.¹ Consent may likewise be presumed from his joining in the indorsement and signing his name on the back of the note with her.² And where the maker of a note payable to a married woman and transferred by her indorsement has subsequently promised payment to the indorsee, the husband's authority for the indorsement will be presumed as against such maker.³

§ 289. **Contracts as Surety—Accommodation.**—At common law a married woman cannot render herself liable as a surety or guarantor for another; and this is true, as we have seen, in many States under the most recent statutory changes of the law. At common law a married woman is not liable upon her bond given for the debt of her husband, nor is her separate estate liable in equity for the payment of such a bond.⁴

A wife's separate estate is not, in general, bound by her indorsement of a note as surety for her husband.⁵ And even now a note, given in New York to a married woman by her husband's firm and indorsed by her as an accommodation for the debt of the firm, will not bind her separate estate, where there is neither separate benefit nor an express charge of her estate.⁶ And, in general, a bill or note given by a married woman for her husband's debt will not render her liable;⁷ although she may have a separate estate.⁸ Such a note, given

¹McClain v. Weidemeyer, 25 Mo. 364 (1857).

²Collier v. Connelly, 15 Ind. 141 (1860); Cobb v. Duke, 36 Miss. 60 (1858).

³Cotes v. Davis, 1 Campb. 485.

⁴Dalbiac v. Dalbiac, 16 Ves. 116. And see, as to wife's liability as surety for her husband, 20 Cent. L. J. 205, March 13th, 1885.

⁵Levi v. Earl, 30 Ohio St. 147 (1876).

⁶Phillips v. Wicks, 4 J. & S. 254 (1873). So, a guaranty by a married woman, Sexton v. Fleet, 2 Hilt. 477 (1859).

⁷Williams v. Hayward, 117 Mass. 532 (1875); Ross v. Walker, 31 Mich. 120 (1875); Alger v. Scott, 54 N. Y. 14 (1873); Emery v. Lord, 26 Mich. 431 (1873); Hetherington v. Hixon, 46 Ala. 297 (1871).

⁸McClure v. Harris, 7 Heisk. 379 (1872); Hansee v. De Witt, 63 Barb. 53 (1871).

as surety for the husband's debt already existing, is void.¹ This was also the rule in Massachusetts prior to the Act of 1874.² But where the husband's debt is only part of the consideration for the wife's note, the balance of the note, being for goods purchased by her, will be valid.³

A wife's note as surety for the husband's debt will not be rendered more binding on her by the fact that the husband has joined in executing it.⁴ Nor will the wife be liable as surety on another note given to take up such joint note.⁵ Nor can she, in general, bind her separate estate by executing such a joint note as surety.⁶ So, she cannot be bound in Georgia by her note for money borrowed to pay her husband's debts, the lender knowing the object of the loan.⁷ So, in Louisiana, a note of the wife, received knowingly by a creditor of the husband for the payment of his debt, is, in the hands of such creditor, utterly void.⁸

But in New York, if a joint note of husband and wife, executed by her as surety for her husband, be expressed to be a "lien and claim" on her separate estate, it will bind such separate estate as belongs to her at the time that judgment is rendered.⁹ So, if a wife gives her note in New York, to pay her husband's note given for clothing for their children, with the intention of charging her separate estate, it will be valid.¹⁰ But in Connecticut a wife's separate estate is not bound by her joint note with her husband given for his

¹ *Wilhelm v. Schmidt*, 84 Ill. 183 (1876).

² *Nourse v. Henshaw*, 123 Mass. 96 (1877).

³ *Spencer v. Humiston*, 9 Hun 71 (1876).

⁴ *National Bank of New England v. Smith*, 43 Conn. 327 (1876).

⁵ *Athol Machine Co. v. Fuller*, 107 Mass. 437 (1871); *Freckling v. Rolland*, 1 J. & S. 499 (1871); S. C., 53 N. Y. 422; *King v. Thompson*, 59 Ga. 380 (1877).

⁶ *Saulsbury v. Weaver*, 59 Ga. 254 (1877); *Bartington v. Bradley*, 16 La. An. 310 (1861). Although in equity she has been held liable on such a note, containing an express charge, *Bradford v. Greenaway*, 17 Ala. 797 (1850).

⁷ *Veal v. Hurt*, 63 Ga. 728 (1879); Ga. Code § 1783, prohibiting all "assumption of debts of the husband."

⁸ *Claverie v. Gerondias*, 30 La. An. 291 (1878).

⁹ *Todd v. Ames*, 60 Barb. 454 (1871).

¹⁰ *Francis v. Ross*, 17 How. Pr. 561 (1859).

debt and containing the words, "Each intending hereby to charge our individual estate."¹

§ 290. In Indiana, a wife will not be bound by a note given for goods sold to her husband.² Nor, in Alabama, for a note given by her after her husband's death, as a renewal, in payment of a note which she had signed *after its delivery* as surety for him in his life-time.³ And it has been held that when a married woman's note for her husband's debt is void, the mortgage given to secure it will be void also;⁴ and that no judgment can properly be rendered against her on a mortgage given to secure her husband's note.⁵

Nor does the fact that her note was given for necessities sold to her husband render her liable.⁶ Nor that it was given for the discontinuance of a suit against the husband;⁷ or in payment of a judgment against him.⁸ Nor is she liable on her joint note with her husband for his debt, because her father's estate, inherited partly by her, was liable as surety for it.⁹ Nor is she liable because the notes were given to enable her husband to carry on the work of a plantation not belonging to her.¹⁰ But her note given for a loan made to the husband to enable him to carry on the work of her farm would be binding on her.¹¹ And in Louisiana, where authorization of a wife's note by a judge is provided for by statute, such authorization will not prevent her setting up that the note in question was given for a debt of her husband.¹²

§ 291. **Recent Statutes on the Subject.**—In some States,

¹Smith v. Williams, 33 Conn. 409 (1876).

²Brick v. Scott, 47 Ind. 299 (1874).

³Hetherington v. Hixon, 46 Ala. 297 (1877).

⁴Koechlin v. Lorber, 26 La. An. 737 (1874).

⁵Ferguson v. Reed, 45 Tex. 574 (1876). The mortgage in this case covered part of her homestead.

⁶Hutchinson v. Underwood, 27 Tex. 255 (1863).

⁷De Vries v. Conklin, 22 Mich. 255 (1871).

⁸Griffin v. Ragan, 52 Miss. 78 (1876).

⁹West v. Laraway, 28 Mich. 464 (1874).

¹⁰Draughon v. Ryan, 16 La. An. 309 (1861).

¹¹Smith v. Kennedy, 13 Hun 9 (1878).

¹²Barth v. Kaso, 30 La. An. 940 (1878).

however, by force of recent statutes, a wife may bind herself by a note given for her husband's debt without any separate benefit or express charge. This is so in Kansas;¹ and to some extent in South Carolina;² and in Wisconsin formerly;³ and, since 1874, in Massachusetts.⁴ In Mississippi such a note binds her personal property and the income of her real estate,⁵ but not the income of her real property after her death.⁶ As to such income for her life, her power, in Mississippi, extends also to the giving of a mortgage securing her notes for her husband's debts.⁷

In Massachusetts, since the statute already referred to, a wife may give or indorse a note for the accommodation of her husband's firm, which will be valid even between the original parties to it.⁸ So, in Maine, a wife's note, signed as surety with her husband in Massachusetts and delivered by mail in Maine, is held to be binding on her.⁹ In Missouri, if a married woman give her note to take up a note of her son, which is thereupon surrendered and destroyed, her note will be binding upon her without mention of any separate estate.¹⁰ But in this case she can hardly be looked upon as a mere surety, there having been a fresh and original consideration for her note. So, in Massachusetts, where her note was given for money loaned at the time to her husband at his request.¹¹

¹ *Deering v. Boyle*, 8 Kans. 525 (1871). And by a joint note with him for his debts, *Wicks v. Mitchell*, 9 *Ib.* 80 (1872).

² Her separate estate will be liable for her bond given on sufficient consideration as surety for her husband, *Whittle v. Wolfe*, 16 So. Car. 256 (1881); or on her note for like consideration and given without duress, for her husband, *Clinkscales v. Hall*, 15 *Ib.* 602 (1880); or for her son, *Pelzer v. Campbell*, *Ib.* 581 (1880).

³ *Heath v. Van Cott*, 9 Wis. 516 (1859). But see, now, *contra*, *Kavanagh v. O'Neill*, 53 *Ib.* 101 (1881).

⁴ *Major v. Holmes*, 124 Mass. 108 (1878); *Thacher v. Churchill*, 118 Mass. 108 (1875); Mass. Laws of 1874 c. 184.

⁵ *Dibrell v. Carlisle*, 48 Miss. 691 (1873).

⁶ *Reed v. Cleman*, 51 Miss. 836 (1876).

⁷ *Foxworth v. Magee*, 44 Miss. 430 (1870); *Foxworth v. Bullock*, 44 Miss. 457 (1870).

⁸ *Kenworthy v. Sawyer*, 125 Mass. 28 (1878).

⁹ *Bell v. Packard*, 69 Me. 105 (1879).

¹⁰ *Myers v. Van Wagoner*, 56 Mo. 115 (1874).

¹¹ *Goodnow v. Hill*, 125 Mass. 587 (1878).

So, in Georgia, where her note was given jointly with her husband in regard to her own business conducted by him for her, although she would not have been bound as a mere surety for him in his business.¹ Whether, in such a case, the wife signs as surety for her husband or in her own separate business, is a question for the jury.²

§ 292. **Accommodation Paper with Express Charge of Separate Property.**—In New York the wife's indorsement for her husband, with an express charge of her separate estate, renders her liable.³ And in New Jersey, where she cannot bind herself for the debt of her husband, her joint note with him for a debt constituting a lien upon his land (the note containing an express charge of her separate estate) has been held binding upon her in consideration of the benefit received by her in regard to her dower interest in the land.⁴ And in New York a wife's note made payable "out of my separate estate," is a sufficient admission that she had such estate.⁵ In Massachusetts, before the Act of 1874, a wife's estate was not liable even in equity upon an accommodation note, where there was neither separate benefit to her, nor express charge of her estate, nor credit given to it.⁶ And this is still the rule in New York and, in general, wherever there is not statutory provision to the contrary.⁷

¹King v. Thompson, 59 Ga. 380 (1877).

²Frecking v. Rolland, 53 N. Y. 422 (1873).

³Corn Exch. Ins. Co. v. Babcock, 42 N. Y. 613 (1870); Barnett v. Lichtenstein, 39 Barb. 194 (1863). The case of Kelso v. Tabor, 52 Barb. 125 (1867), in which the contrary was held, is no longer an authority, Corn Exch. Ins. Co. v. Babcock, *supra*. Such express charge is also necessary in *Nebraska* to render valid a wife's note given as surety, State Sav. Bank v. Scott, 10 Neb. 83 (1880).

⁴Perkins v. Elliott, 8 C. E. Green 526 (1872); S. C., 7 *Ib.* 127.

⁵Waggoner v. Eager, 8 Hun 142 (1876).

⁶Willard v. Eastham, 15 Gray 328 (1860). "And our conclusion," said Judge Hoar in this case, p. 335, "is that when by the contract the debt is made expressly a charge upon the separate estate, or is expressly contracted upon its credit, or when the consideration goes to the benefit of such estate or to enhance its value, then equity will decree that it shall be paid from such estate or its income to the extent to which the power of disposal by the married woman may go. But where she is a mere surety or makes the contract for the accommodation of another, without consideration received by her, the contract being void at law, equity will not enforce it against her estate, unless an express instrument makes the debt a charge on it."

⁷Yale v. Dederer, 18 N. Y. 265 (1858); S. C., 22 *Ib.* 450; S. C., 68 *Ib.* 329;

And it is a good plea by a married woman that she signed the note simply as surety for her husband without any separate benefit to herself or to her separate estate.¹ An intention to charge her separate estate may, however, be presumed from circumstances, and such presumption has been made in the case of a joint note given in compromise of a suit against the husband.² So, where the wife signs as principal and the husband as surety, and the payee is directed to send the money to her, the note will be presumed to have been made for her separate use, but the presumption may be rebutted by evidence of a renewal by the husband without the wife.³

§ 293. **Subsequent Promise After Death of Husband—Or Divorce.**—At common law the wife's incapacity to bind herself by contract during coverture extended to her subsequent promise made after her husband's death in consideration of such contract, and the subsequent promise was held to be without valid consideration.⁴ So, a note given by her after her husband's death has been held in New York not to be supported by a purchase of goods made by her during coverture as a sole trader.⁵ So, forbearance extended to a wife on her note given as a sole trader is no consideration for her note given after her husband's death.⁶ So, she cannot make herself liable for a note given as surety for her husband by a renewal of it after his death.⁷ And, in like manner, her promise after his death to pay a note made by her during coverture is unavailable.⁸ But she would be bound by her

"If the promise," said Judge Comstock in this case, "is on her own account, if she or her separate estate receives a benefit, equity will lay hold of these circumstances and compel her property to respond to the engagement. Where these grounds of liability do not exist, there is no principle on which her estate can be made answerable."

¹Coates v. McKee, 26 Ind. 223 (1866).

²Lincoln v. Rowe, 51 Mo. 571 (1873).

³Prendergrast v. Borst, 7 Lans. 489 (1873).

⁴Byles 65; 1 Parsons 79; Littlefield v. Shee, 2 B. & Ad. 811 (1831); Felton v. Reid, 7 Jones 269 (1859); Vance v. Wells, 6 Ala. 737 (1844); Porterfield v. Butler, 47 Miss. 165 (1873).

⁵Goulding v. Davidson, 28 Barb. 438 (1858).

⁶Lloyd v. Lee, 1 Stra. 94.

⁷Hetherington v. Hixon, 46 Ala. 297 (1877).

⁸Smith v. Allen, 1 Lans. 101 (1869).

promise after his death to pay a joint note given by them for her ante-nuptial debts.¹ Although, as has been seen, a new note by her as widow in payment of a joint note made with her husband will not be binding on her, especially if given by her without knowledge that she was not liable on the former note.² Nor will a promise, made after her husband's death, to pay for goods purchased by her while living separate from her husband and in adultery, be binding on her, although these circumstances were unknown to the holder.³

In like manner her promise, made after divorce, to pay for goods purchased by her while married, is without consideration.⁴ And this is even true of her promise made after divorce to pay a note given by her for necessities furnished on her credit before the divorce, and while she was living separate from, and deserted by, her husband.⁵ In Pennsylvania, however, an agreement by the wife before divorce is sufficient consideration for a promise made by her afterwards.⁶

And notwithstanding a wife's common law incapacity to make a note, she may as a widow bind herself in some cases by a subsequent ratification, *e. g.* by keeping from her husband's administrator the goods purchased by her, for which she had given the note.⁷ And if money is borrowed by a wife having a separate estate, her liability in equity is a sufficient consideration for a promise of payment made by her after her husband's death.⁸ And it has been held that her liability as a wife for the rent of a house is good consideration for her due-bill given after she became a widow.⁹

§ 294. **Defense of Coverture—When Admissible.**—The defense of coverture, like all other defenses growing out of a

¹ *Parker v. Cowan*, 1 Heisk. 518 (1870).

² *Coward v. Hughes*, 1 K. & J. 443 (1835).

³ *Meyer v. Haworth*, 8 Ad. & El. 467 (1838).

⁴ *Watkins v. Halstead*, 2 Sandf. 311 (1849).

⁵ *Hayward v. Barker*, 52 Vt. 429 (1880).

⁶ *Hemphill v. McClimans*, 24 Penna. St. 367 (1855).

⁷ *Hunter v. Duvall*, 4 Bush 438 (1868).

⁸ *Lee v. Muggeridge*, 5 Taunt. 36 (1813).

⁹ *Cleland v. Low*, 32 Ga. 458 (1861).

party's incapacity, is the personal privilege of the married woman or her representative, and the indorser of a note cannot set up in his defense the coverture of the maker;¹ even though the holder took the note with a knowledge of that fact.² In like manner the guarantor of a note cannot set up that the maker was a married woman;³ nor the second indorser, that the first indorser was a married woman.⁴ Nor can the drawer of a bill set up the incapacity of the indorser;⁵ nor the acceptor, the incapacity of drawer or indorser.⁶ So, the drawer of a bill made payable to a married woman cannot question her right to receive payment of it.⁷

§ 295. **Wife's Liability While Living Separate.**—At common law a wife's liability is restricted to cases where her husband is *civiliter mortuus*, banished or transported.⁸ Unless so provided by statute, a wife living separate from her husband, although in another State, does not thereby become liable on her note.⁹ And this is true, although she have a separate maintenance secured to her by deed.¹⁰ And while living separate, she cannot make a valid grant of an annuity out of such deed for her separate maintenance.¹¹ Nor can

¹ *Haley v. Lane*, 2 Atk. 181 (1741); *Prescott Bank v. Caverly*, 7 Gray 217 (1856); *Erwin v. Downs*, 15 N. Y. 575 (1857); *Archer v. Shea*, 14 Hun 493 (1878); *Leitner v. Miller*, 49 Ga. 489 (1873). Nor can an indorser set up in defense against a subsequent holder that a note purporting to be made by an agent was void as to the maker because he had died before it was signed, *Burrill v. Smith*, 7 Pick. 291 (1828).

² *Erwin v. Downs*, 15 N. Y. 575 (1857).

³ *Nabb v. Koontz*, 17 Md. 283, 291 (1861).

⁴ 1 Parsons 79; *Ogden v. Blydenburgh*, 1 Hilt. 182 (1856); *Prescott Bank v. Caverly*, 7 Gray 217 (1856).

⁵ This has been held in case of incapacity as a bankrupt, *Drayton v. Dale*, 2 B. & C. 293; *Pitt v. Chappelow*, 8 M. & W. 616; or as a government officer, *Knox v. Reeside*, 1 Miles 294 (1836).

⁶ *Byles* 67; *Prestwick v. Marshall*, 4 C. & P. 594; *S. C.*, 7 Bing. 565; *Smith v. Marsack*, 6 C. B. 486. So, where the bill was both drawn and indorsed by the wife, *Prince v. Brunatte*, 1 Bing. N. C. 435.

⁷ *Cathell v. Goodwin*, 1 H. & G. 468 (1827).

⁸ *Edwards v. Davis*, 16 Johns. 281 (1819).

⁹ *Chouteau v. Merry*, 3 Mo. 182 (1833).

¹⁰ *Byles* 65; *Marshall v. Rutton*, 8 T. R. 545. But see *Jones v. Lewis*, 7 Taunt. 54; *S. C.*, 2 Marsh. 385. And a wife has been held liable in such case on her acceptance, *Stuart v. Kirkwall*, 3 Madd. 387.

¹¹ *Hyde v. Price*, 3 Ves. 437.

she be sued alone by reason of her living separate and having a separate maintenance.¹

And in England she is not liable on her contracts, even when living separate from her husband and divorced *a mensa et thoro*.² But in America, if living separate and divorced, she is liable on her note and may be sued alone.³

§ 296. **Living Separate—And With Separate Estate.**—In England she is liable on her bond, if living separate from her husband and having a separate estate.⁴ When so living and having a separate estate, her estate is liable in equity for the fees of a solicitor employed by her without any express agreement or charge of her separate property.⁵ And a bill in equity will lie against her for moneys loaned to and used by her for necessities while deserted by her husband, she having a separate estate.⁶ In Louisiana she is not liable on her note while living separate, unless it was made for her separate benefit.⁷ But, in general, where she is living separate from her husband and has a separate estate, in a contract for work and labor done for her, an intention to charge such estate will be presumed from circumstances.⁸

§ 297. **Living Separate and as Sole Trader.**—Where she is living separate from her husband and in adultery and carrying on a separate business, she will be liable for work done for her in such business.⁹ And it has been held that where a wife is living in England apart from her husband, who is

¹Lean v. Schutz, 2 W. Bl. 1195; Hatchett v. Baddeley, *Ib.* 1079; Lewis v. Lee, 3 B. & C. 291 (1824).

²Lewis v. Lee, 3 B. & C. 291; S. C., 5 D. & R. 90. And in England a warrant of attorney given by a married woman divorced *a mensa et thoro* and living separate from her husband will be set aside, Faithorne v. Blaguire, 6 M. & S. 73.

³Pierce v. Burnham, 4 Metc. 303 (1842).

⁴Corbett v. Poelnitz, 1 T. R. 5.

⁵Murray v. Barlee, 3 My. & K. 209 (1834); Coleman v. Wooley, 10 B. Mon. 320 (1850).

⁶Jenner v. Morris, 3 DeG. F. & J. 45; Walker v. Simpson, 7 Watts & S. 83, Kenyon v. Farris, 47 Conn. 510 (1880).

⁷Lee v. Cameron, 14 La. An. 711 (1859).

⁸Conlin v. Cantrell, 64 N. Y. 217 (1876); Coleman v. Wooley, 10 B. Mon. 320 (1850).

⁹Cox v. Kitchen, 1 Bos. & P. 338.

an alien residing in France in the public service and detained by such disability in France, she is liable as a *feme sole* for wages of servants and for money lent her.¹ So, if her husband resides abroad and she is living in England and carrying on business there as a sole trader.² And if her husband is an alien enemy in the enemy's country and she is living separate from him in England, she is liable as a sole trader for wages and for money lent her.³ So, where the husband is an alien residing abroad and appears never to have been in the United States, and his wife is living separate from him in the United States and carrying on business in her maiden name as a sole trader, she will be liable on her note.⁴ So, she would be liable in like circumstances upon her indorsement, her husband's consent being presumed from the circumstances of the case.⁵

And, in general, where a married woman is living separate from her husband and doing business as a sole trader, an intention to charge her separate estate will be presumed;⁶ especially where she has been abandoned by her husband.⁷

§ 298. **Deserted by Husband.**—And where she was living separate from her husband, in Massachusetts, as a sole trader, on account of his cruelty, he living in New Hampshire, she was permitted, in Massachusetts, to sue alone on a note held by her as payee.⁸ So, the wife of a seaman, who has been absent for more than two years, has been held, in Pennsylvania, to have the rights of a sole trader and to be entitled to receive as such a distributive share of her parent's estate.⁹ In Georgia a married woman deserted by her husband may

¹ *Derry v. Duchess of Mazarine*, 1 Ld. Raym. 147.

² *De Gaillon v. L'Aigle* 1 Bos. & P. 357.

³ *Deerly v. Mazarine*, 1 Salk. 116.

⁴ *McArthur v. Bloom*, 2 Duer 151 (1853).

⁵ *Roland v. Logan*, 18 Ala. 307 (1850).

⁶ *Johnson v. Gallagher*, 30 L. J. Ch. 298 (1861); S. C., 3 DeG. F. & J. 513; *London Chartered Bank v. Lempriere*, L. R. 4 P. C. 593 (1873).

⁷ *Rhea v. Rhenner*, 1 Pet. 105 (1828).

⁸ *Abbott v. Bailey*, 6 Pick. 89 (1827).

⁹ *Valentine v. Ford*, 2 Browne 193 (Pa. 1812).

make a valid note.¹ But in Vermont she is not liable on her note given under such circumstances even for necessities sold her on her own credit.² If, while living separate, she be sued alone on her note, the burden of proving desertion is in all cases on the plaintiff.³ In Colorado she has been held liable on a lease, where she was living separate from, and abandoned by, her husband, who had never been in the State.⁴ In Alabama, if living separate from, and abandoned by, her husband, who had left the State, she may sue alone on a note made payable to her.⁵ In South Carolina, if her husband has left the State and has not been heard from, she will be liable on her note.⁶ But in Kentucky she will not be, unless especially empowered by the court to act as a *feme sole*; even though her husband have abandoned her and his whereabouts be unknown.⁷ But at common law, if the husband has been transported for seven years, and has not afterwards returned, the wife may sue as an unmarried woman.⁸ And where the husband has been absent for more than seven years and the wife pleads her coverture in her defense, she must prove him to have been alive within that time.⁹ In Louisiana if a wife is separated from her husband by decree of court and is administering her own affairs, she is liable on her note as a *feme sole*.¹⁰ And it has been held in the United States that a woman living separate from, and abandoned by, her husband, who is both non-resident and alien, may sue and be sued as an unmarried woman.¹¹ Although in the

¹Clark v. Valentine, 41 Ga. 143 (1870).

²Hayward v. Barker, 52 Vt. 429 (1880).

³Gregory v. Pierce, 4 Metc. 478 (1842).

⁴Blumenberg v. Adams, 49 Cal. 308.

⁵Mead v. Hughes, 15 Ala. 141 (1849); Arthur v. Broadnax, 3 Ib. 557 (1842).

⁶Bean v. Morgan, 2 McCord 148 (1827). And her conveyance is valid under like circumstances, Boyce v. Owens, 1 Hill 8 (So. Car. 1833).

⁷Hannon v. Madden, 10 Bush 664 (1874).

⁸Carrol v. Blencow, 4 Esp. 27 (1801).

⁹Hopewell v. De Pinna, 2 Campb. 113 (1809); Lambert v. Atkins, Ib. 273.

¹⁰Cormier v. De Valcourt, 33 La. An. 1168 (1881).

¹¹Gregory v. Paul, 15 Mass. 31 (1818); Robinson v. Reynolds, 1 Aiken 174 (1826).

Duchesse de Pienne's case, already referred to, the contrary was held in England.¹

§ 299. **Sole Trader.**—Where the wife is a sole trader by the custom of London and living separate from her husband, an intention to charge herself as such will be presumed.² Especially if her husband is residing abroad.³ And in such case his consent to her bill or indorsement will be presumed.⁴ So, if she has been abandoned by her husband and is living separate from him and doing business as a sole trader, she will be liable as such on her contracts.⁵ And where she is carrying on business for herself with her husband's consent, her separate estate will be liable.⁶ But in all such cases either her separate benefit or the fact of her separate business must appear.⁷

If, however, she has separate property and is doing business as a sole trader, the want of separate benefit to her from the contract will be no defense.⁸ If she is a sole trader with a separate estate of her own, it will be liable for her debts contracted in the business.⁹ Thus, if she engage in the business of keeping a boarding house and purchase goods for it on her own credit, she will be liable.¹⁰

And the note of a sole trader given in her business will be binding upon her;¹¹ especially where it has been given for

¹ *Kay v. Duchesse de Pienne*, 3 Campb. 123 (1811). Although it is said that it would be otherwise if the husband had never been in England, *Ib.* This case has since been questioned in *Barden v. Keverberg*, 2 M. & W. 61 (1836).

² *Johnson v. Gallagher*, 30 L. J. Ch. 298 (1861); S. C., 3 DeG. F. & J. 513. See, too, *London Chartered Bank v. Lempriere*, L. R. 4 P. C. 593 (1873), disapproving *Shattock v. Shattock*, L. R. 2 Eq. 182 (1866).

³ *De Gaillon v. L'Aigle*, 1 Bos. & P. 357; *McArthur v. Bloom*, 2 Duer 151 (1850).

⁴ *Roland v. Logan*, 18 Ala. 307 (1850).

⁵ *Rhea v. Rhenner*, 1 Pet. 105 (1828).

⁶ *Todd v. Lee*, 16 Wis. 480 (1863). And her stock in trade is her separate property and liable as such for debts incurred in the business, *Partridge v. Stocker*, 36 Vt. 108 (1863).

⁷ *Bowles v. Turner*, 15 La. An. 352 (1860).

⁸ *Levy v. Rose*, 17 La. An. 113 (1865).

⁹ *Todd v. Lee*, 15 Wis. 365 (1862).

¹⁰ *Tillman v. Shackleton*, 15 Mich. 447 (1867).

¹¹ *Camden v. Mullen*, 29 Cal. 564 (1866); *Nispel v. Laparle*, 74 Ill. 306 (1874).

goods purchased for her business on her sole credit.¹ So, in Louisiana, where she is separated in matter of property from her husband by judgment of the court, and gives her note in her sole business as a public merchant.² And in Colorado she is liable by force of the statute for goods bought for her business as a sole trader.³ So, in New York, since the Act of 1860, she is liable for her note given as a sole trader, although not for the benefit of her separate estate.⁴ And even for a note given after the passage of the act for goods purchased before as a sole trader, and still in her possession at the time of making the note.⁵ So, she would be liable upon her indorsement of a note made to her as a sole trader, even, it seems, though made by her husband.⁶

But the mere fact of her doing business for herself will not render her liable upon her note for money loaned, not appearing to be in such business, and a subsequent divorce will not make such note valid.⁷ And in Indiana it has been held that a wife, having a separate estate and doing business as a sole trader, will not be liable for goods purchased by her as such, where no intention to charge her separate estate appears.⁸ So, in Kentucky, where a married woman is part owner and proprietor of a hotel and gives her note for supplies purchased for it, it is held that she will only be liable upon proof that such supplies are necessary to the business.⁹

Although the contracts of a sole trader are recognized as valid in London, she cannot as such bring an action in her own name without her husband, in the courts of Westminster, to recover for goods sold by her or other contracts made in

¹Gillam v. Boynton, 36 Mich. 236 (1877).

²Moore v. Coleman, 30 La. An. 1157 (1878).

³Barnes v. De France, 2 Col. 294 (1874); Col. R. S. 455.

⁴Lewis v. Woods, 4 Daly 241 (1872); N. Y. Stat. 1860 c. 90.

⁵Barton v. Beer, 35 Barb. 78 (1861); S. C., 21 How. Pr. 309.

⁶Wilthaus v. Ludecus, 5 Rich. 326 (1852).

⁷O'Daily v. Morris, 31 Ind. 111 (1869). Nor will she be liable as a sole trader on a note given for accommodation and with no advantage to her separate business to one having notice thereof, *Bell v. Ladd*, 14 Phila. 168 (1880).

⁸Hasheagen v. Specker, 36 Ind. 413 (1871).

⁹Harris v. Dale, 5 Bush 61 (1868).

her separate business.¹ Nor is she liable to be sued alone in those courts, as a sole trader.² On the other hand, it was held long since, in Massachusetts, that a woman, living separate from her husband and doing business for herself as a sole trader, might sue alone upon a note or bill held by her.³

¹Caudell *v.* Shaw, 4 T. R. 361.

²Beard *v.* Webb, 2 Bos. & P. 93.

³Abbott *v.* Bailey, 6 Pick. 89 (1827).

II. WIFE'S SEPARATE ESTATE.

- 300. Separate Estate in Equity.
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- 312. Separate Benefit—Must Appear.
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§ 300. **Separate Estate in Equity.**—Independent of recent statutes, the separate estate of a married woman has long been recognized and protected in courts of equity. And, in general, a wife is in equity treated, so far as regards her separate estate, as a *feme sole*.¹ Where a note is indorsed to a wife, it is presumed, under the New York Statute of 1849, to be her separate estate.² And the fact that it was given to her in consideration of money loaned by her husband will not of itself amount to a rebuttal of such presumption.³ And in New York, since the Acts of 1848 and 1849, a married woman may bring an action on a note made to her for a consideration proceeding from her husband.⁴

The separate estate of a wife is, in general, not liable for her husband's debts,⁵ but is liable in equity for her own debts.⁶ So, the separate estate of a married woman is liable in equity for the payment of her note.⁷ Although this is

¹ *Headen v. Rosher*, 1 Mac & Y. 90 (1824); *Cooke v. Husbands*, 11 Md. 492 (1837); *Burnett v. Hawpe*, 25 Gratt. 481 (1874). For a very full and able discussion of the liabilities attaching to and growing out of a married woman's separate estate the reader is referred to the case of *Hulme v. Tenant*, 1 Bro. C. C. 16, and the English and American notes upon the case in 1 White & Tud. L. C. Eq. 679 *et seq.*

² *Dillaye v. Parks*, 31 Barb. 132 (1860).

³ *Looke v. Newman*, 75 Ill. 215 (1874).

⁴ *Rynders v. Crane*, 3 Daly 339 (1870).

⁵ *Weeman v. Anderson*, 42 Penna. St. 311 (1862).

⁶ *Aylett v. Ashton*, 1 My. & Cr. 105 (1835).

⁷ *Bullpin v. Clark*, 17 Ves. 365.

not so, unless the requirements of existing local statutes are followed.¹

§ 301. **Disposal of Separate Estate Restricted.**—The power of a wife to bind her separate estate is often limited, even in equity, by the instrument creating the estate.² If, however, there are no restrictions in such creating instrument, she may dispose of her separate property in equity as an unmarried woman, but only in the manner, if any, prescribed by such instrument or by statute.³ Where she holds her separate estate with restrictions against anticipation or alienation, it will not be liable for the payment of a note given by her jointly with her husband and others.⁴ In some States, however, it is held that she has no power over her separate estate except such as is expressly given to her. Thus, where she has a separate estate created by will with express power to dispose of it by will, it has been held that her note not being expressly authorized will not bind her separate estate.⁵ So, where she gives a bill of exchange or obtains credit, with the intention of charging her separate estate, but does not charge it as provided by the marriage settlement creating the estate, it will not be bound.⁶ But the better and more general opinion, at least in the United States, is that the wife's power over her separate estate is absolute, except where expressly restricted by the instrument creating it.⁷

¹ *Franklin v. Beatty*, 27 Miss. 347 (1854).

² *Miller v. Williamson*, 5 Md. 219 (1853); *Tarr v. Williams*, 4 Md. Ch. 68 (1853); *Williams v. Donaldson*, *Id.* 414; *Doty v. Mitchell*, 9 Sm. & M. 435 (1848); *Montgomery v. Agricultural Bank*, 10 *Id.* 566; *Thomas v. Folwell*, 2 Whart. 11 (1836); *Wallace v. Costar*, 9 Watts 137 (1839); *Reid v. Lamar*, 1 Strobb. Eq. 27; *Morgan v. Elam*, 4 Yerg. 375 (1833); *Harris v. Harris*, 7 Ired. Eq. 111 (1850); *Williamson v. Becklam*, 8 Leigh 20 (1837); *Marshall v. Stevens*, 8 Humph. 159 (1847); *Metcalf v. Cooke*, 2 R. I. 355 (1852).

* *Cooke v. Husbands*, 11 Md. 492 (1857).

⁴ *Roberts v. Watkins*, 36 L. T. (N. S.) 799 (1877).

⁵ *Metcalf v. Cook*, 2 R. I. 355 (1852).

⁶ *Doty v. Mitchell*, 9 Sm. & M. 435 (1848); *Montgomery v. Agricultural Bank*, 10 *Id.* 567 (1848).

⁷ *Leaycraft v. Hedden*, 3 Green Ch. 512 (1845); *Jaques v. Methodist Episc. Church*, 17 Johns. 548 (1820), reversing 3 Johns. Ch. 78; *Kimm v. Weippert*, 46 Mo. 535 (1870); *Burnett v. Hawpe*, 25 Gratt. 481 (1874). But in *Nebraska* a married woman's note must be given with reference to, and taken on the

§ 302. **Separate Estate—Express Charge.**—The liability of the wife's separate estate to answer for her debts and contracts is more plain, where it is expressly charged by her with payment of them. And her separate estate will be liable in equity on her note given with her husband for his debts, if such estate be expressly charged,¹ at least in the absence of statutes to the contrary. And even where the wife is prohibited by statute from binding herself for her husband's debts, she will be liable on a note given with her husband to pay off a mortgage on his lands, where she expressly charges her separate estate, the benefit to her dower interest in the land so relieved being held to be a sufficient independent consideration.² So, a joint note of a husband and wife expressly binding "our separate and individual estates," has been held to bind a wife's separate estate in Maryland in equity, even prior to the statute of 1860.³ And it has been held in North Carolina that a sealed note by a husband and wife referring to the wife's separate estate will be binding on it in equity, though not at common law.⁴ So, where a married woman has by will charged her separate property with her debts generally, it will be liable for debts not expressly enumerated and charged.⁵

In New York it has been held that a wife's separate estate is liable for her note given, with intention to charge it, in payment of her husband's note originally given for clothing purchased for their children.⁶ So, it will be liable on her

credit of, her separate estate, *Barnum v. Young*, 10 Neb. 309 (1880). A married woman's note is binding on her separate estate in California, *Alexander v. Bouton*, 55 Cal. 15 (1880); and such note will be construed to relate to her separate property generally and not to that alone which is described in a collateral mortgage, *Ib.* So, a married woman's note binds her separate property in *Missouri*, *Boatman's Sav. Bank v. Collins*, 75 Mo. 280 (1882); but is otherwise null and void, *Ib.* So, too, in *Vermont*, the joint note of husband and wife given for a debt created by her for the benefit and on the credit, of her separate estate, *Sargeant v. French*, 54 Vt. 384 (1882).

¹ *Bradford v. Greenaway*, 17 Ala. 797 (1850).

² *Perkins v. Elliott*, 8 C. E. Green 526 (1872), reversing 7 *Ib.* 127.

³ *Hall v. Eccleston*, 37 Md. 510 (1872).

⁴ *Pippen v. Wesson*, 74 N. C. 437 (1876).

⁵ *Owens v. Dickenson*, 1 Cr. & Ph. 48 (1840).

⁶ *Francis v. Ross*, 17 How. Pr. 561 (1859).

indorsement of a note of her husband with intention of charging it, although the estate be not described.¹ And if she make a promissory note payable "from my personal estate," this will be equivalent to a charge of her separate estate.²

§ 303. **Effect of Express Charge on Negotiability—Estoppel—Form.**—A charge of a wife's separate estate contained in a bill or note will not affect its negotiability.³ Nor, on the other hand, will an indorsement by her containing an express charge of her separate personal estate amount to a mortgage of personal security within the meaning of the National Bank Act.⁴

On the other hand, the note of a married woman, given under duress and falsely purporting to be for the benefit of her separate estate when it is not so, will not be binding upon her, even at suit of a *bona fide* holder for value.⁵ And where a married woman has no separate estate, she cannot by expressly charging her separate estate become individually bound for the debt of another person.⁶

A memorandum upon a married woman's note charging her separate estate is a part of the note.⁷ And where a wife gives her note as surety for her husband or a third person, in order that her separate estate may be bound by it, an intention to charge it should appear in the instrument, or it must be shown to have been given for the direct benefit of such estate.⁸

In general, a married woman's note is not binding upon

¹Corn Exch. Ins. Co. v. Babcock, 42 N. Y. 613 (1870).

²First Nat. Bank v. Hurlburt, 22 Hun 310 (1880).

³Loomis v. Ruck, 14 Abb. Pr. (N. S.) 385 (1873).

⁴Third Nat. Bank v. Blake, 73 N. Y. (1878).

⁵Loomis v. Ruck, 56 N. Y. 462 (1874).

⁶Wilson S. M. Co. v. Fuller, 60 How. Pr. 480 (1881).

⁷Treadwell v. Archer, 76 N. Y. 196 (1879).

⁸Yale v. Dederer, 22 N. Y. 450 (1860); S. C., 18 N. Y. 265; S. C., 68 N. Y. 329 (1877). In Upper Canada, under the Statute of 1882, a married woman can bind her separate estate by a note given with express reference to it for the accommodation of her husband, Consolidated Bank v. Henderson, 29 Upper Canada C. P. 549 (1879). So, too, Frazee v. McFarland, 43 Up. Can. Q. B. 281 (1878), where credit was moreover given to such separate estate.

her in New York, unless made a charge on her separate estate.¹ So, in New Hampshire, if given for labor on the farm of her first husband and renewed after her second marriage, it will not be binding on her separate estate, unless it appears to have been made in respect to it.² In Maryland the intention to charge her separate estate must appear in the instrument.³ So in Tennessee;⁴ and in Illinois.⁵ So, in New York, a wife's separate estate will not be liable for ante-nuptial debts without an express charge.⁶

But it is not necessary that the intention to charge a wife's separate estate should appear in a note, if it be contained in a written declaration attached to the note and delivered with it as one instrument.⁷ And it has been held sufficient if shown by a collateral mortgage upon her separate property.⁸ And her separate estate not covered by the mortgage has been held liable in such case for a deficiency after sale of the mortgaged premises.⁹

§ 304. **Implied Charge of Separate Estate.**—It is necessary in many cases to the validity of a married woman's note, as has been already said, that there should be both a separate estate to charge and an intention to charge it.¹⁰ The intention to charge it will often be implied. Thus, where a husband signs a note as "acting trustee" for his wife by her authority, and with the intention of charging her separate estate, for necessities furnished to her while an infant and

¹*Bloomingtondale v. Lisberger*, 24 Hun 355 (1881).

²*Shannon v. Canney*, 44 N. H. 592 (1863).

³*Koontz v. Nabb*, 16 Md. 549 (1860).

⁴*Kirby v. Miller*, 4 Coldw. 3 (1867); *Cherry v. Clements*, 10 Humph. 552 (1850).

⁵*Williams v. Huguenin*, 69 Ill. 214 (1873).

⁶*Vanderheyden v. Mallory*, 1 N. Y. 452 (1848).

⁷*Sherwood v. Archer*, 10 Hun 73 (1877).

⁸*Alexander v. Bouton*, 55 Cal. 15 (1880); especially if the note relates to her separate estate, *Webb v. Hazelton*, 4 Neb. 308 (1876). But in Texas, notwithstanding the mortgage on her separate estate, her note or other simple contract is only binding so far as given for necessities for herself or family or for the benefit of her separate estate, *Rhodes v. Gibbs*, 39 Tex. 432 (1873).

⁹*Ballin v. Dillaye*, 37 N. Y. 35 (1867).

¹⁰*Cobine v. St. John*, 12 How. Pr. 333 (1856).

before her marriage, her separate estate will be liable for the payment.¹ It has been held in New York that to bind a wife's separate estate the intention to charge it must be expressed or inferable from the direct benefit to her.² And the intention to charge her estate, *e. g.* for goods purchased, must exist at the time of making the contract and cannot be found first in some subsequent promise so to charge it.³

But it is not in general necessary that the charge should be made in so many words. Thus, an agreement on the part of a wife to pay a debt out of her separate estate will amount in equity to a charge of the estate.⁴ So, an intention to charge such estate may be presumed from her acknowledgment of the correctness of the account against her, for the payment of which the promise is made.⁵ On the other hand, no intention to charge a wife's separate estate will be implied from her mere agreement to pay for nursing and care of her father.⁶

§ 305. **Charge Implied from Living Separate.**—As has been said, where a wife has a separate estate and is living separate from her husband, she is liable at common law on a bond given by her.⁷ So, under like circumstances, for solicitor's fee, without either express agreement to pay or express charge.⁸ And especially where under the same circumstances the credit has been given to the wife, an intention on her part to charge her separate estate will be presumed.⁹ And, in general, where a wife has a separate estate and lives separate from her husband, an intention to charge her estate may be presumed from the circumstances of the case;¹⁰

¹ *Baker v. Gregory*, 28 Ala. 544 (1856).

² *Owen v. Cawley*, 36 Barb. 52 (1861).

³ *White v. Story*, 43 Barb. 124 (1864).

⁴ *Oakley v. Pound*, 1 McCarter 178 (1862); *Leaycraft v. Hedden*, 3 Green Ch. 542 (1845).

⁵ *Collins v. Rudolph*, 19 Ala. 616 (1851).

⁶ *Manchester v. Sahler*, 47 Barb. 155 (1866).

⁷ *Corbett v. Poelnitz*, 1 T. R. 5.

⁸ *Murray v. Barlee*, 3 My. & K. 209 (1834).

⁹ *Coleman v. Wooley*, 10 B. Mon. 320 (1850).

¹⁰ *Conlin v. Cantrell*, 64 N. Y. 217 (1876).

especially where the wife is also doing business for herself as a sole trader.¹

§ 306. **Charge Implied from Giving Note or Bill.**—And where a wife has a separate estate, an intention to charge it has been presumed in many cases merely from her giving a note or bill.² But even in such case it has been held that the contract must be shown by the instrument itself and by that only.³ The presumption is, however, not lessened by the fact that the note has been executed in blank.⁴ It has, on the other hand, been denied that any such presumption is to be made from the mere note or bill of a married woman;⁵ although the weight of authority appears to be in favor of the rule as first stated. And the same presumption of a charge has been made in the case of a married woman's indorsement.⁶ Under the statute of Wisconsin her indorsement is

¹Johnson v. Gallagher, 30 L. J. Ch. 298 (1861); S. C., 3 DeG. F. & J. 513. In this case, however, the bill was dismissed because the separate estate had been disposed of. "It is perfectly clear," said Turner, L. J., p. 515, "that when a woman has property settled to her separate use, she may bind that property without distinctly stating that she intends to do so. She may enter into a bond, bill, promissory note or other obligation which, considering her state as a married woman, could only be satisfied by means of her separate estate, and therefore the inference is conclusive that there was an intention, and a clear one on her part, that her separate estate, which would be the only means of satisfying the obligation into which she entered, should be bound." This language is cited with approval by James, L. J., in London Chartered Bank v. Lempriere, L. R. 4 P. C. 593 (1873), dissenting from Shattock v. Shattock, L. R. 2 Eq. 182 (1866), which restricted such implication to cases where the wife had an absolute interest in the property, with power to charge it in any manner she pleased.

²Coats v. Robinson, 10 Mo. 757 (1847); Dallas v. Head, 32 Ga. 604 (1861); Bachelder v. Sargent, 47 N. H. 262 (1867); Barnes v. De France, 2 Col. 294 (1874); Chapman v. Foster, 6 Allen 136 (1863); Pope v. Hooper, 6 Neb. 178 (1877); Whitesides v. Cannon, 23 Mo. 473 (1856); Lillard v. Turner, 16 B. Mon. 374 (1855); approved in Burch v. Breckinridge, *Id.* 487. And this has been applied even to notes signed or indorsed as surety, Jarman v. Wilkerson, 7 B. Mon. 293 (1847); Bell v. Kellar, 13 *Id.* 381 (1852), Marshall, J., saying in this case, "If she has a separate estate and does any specific act which directly involves and pledges her credit, it must be referred to her separate estate, which she can bind, and on which alone her credit rests. And such act must be considered as implying a charge upon her estate." So, in Kansas, although given in payment of the husband's debts, Deering v. Boyle, 8 Kans. 525 (1871); Wickes v. Mitchell, 9 *Id.* 80 (1872).

³Metropolitan Bank v. Taylor, 62 Mo. 338 (1876).

⁴Morrison v. Thistle, 67 Mo. 596 (1878).

⁵Knox v. Jordan, 5 Jones Eq. 175 (1859); Staley v. Hamilton, 19 Fla. 275 (1882).

⁶Bell v. Kellar, 13 B. Mon. 381 (1852); Frank v. Lilienfeld, 33 Gratt. 377 (1880).

not binding upon her at law and is only binding in equity upon her separate estate in case of separate benefit, an express charge, or credit given directly to her.¹ And where her indorsement is placed for accommodation on her husband's note, an intention to charge her separate estate will not be presumed.²

But in equity, and in the absence of statutory requirements as to an express charge, a wife's separate estate will be liable as we have seen for the payment of her bond or other contract.³ In such case an intention to charge her estate is to be presumed from the instrument itself and the very fact of her giving it.⁴ And in England this has been held to be true in a contract for subscription to stock.⁵

So, in England, since the Married Woman's Act of 1870, a wife's separate estate has been held liable without any express charge for the payment of a joint and several note given by herself and her husband, the husband being insolvent.⁶ And in the United States it has been held in many cases that an intention to charge her separate estate is to be presumed from the wife's giving a joint note with her husband;⁷ although such note has been given to pay off a

¹ *Flanders v. Abbey*, 6 Biss. C. C. 16 (1874). See, too, Wisconsin Statute of 1860; *Conway v. Smith*, 13 Wis. 125.

² *Levi v. Earl*, 30 Ohio St. 147 (1876).

³ *Norton v. Turvil*, 2 P. Wm. 144; *Peacock v. Monk*, 2 Ves. 193; *Hulme v. Tenant*, 1 Bro. C. C. 16 (1778); S. C., 1 White & T. L. C. Eq. 679; *Leaycraft v. Hedden*, 3 Green Ch. 542 (1845).

⁴ *Burnett v. Hawpe*, 25 Gratt. 488 (1874); *Garland v. Pamplin*, 32 *Ib.* 303 (1879); *Darnall v. Smith*, 26 *Ib.* 884 (1875). In this latter case the order given was on a particular estate which was held to be primarily and not exclusively liable.

⁵ *In re Leeds Banking Company, Matthewman's Case*, L. R. 3 Eq. 781 (1866). Here the decisive circumstances showing intention seemed to be her acceptance of shares allotted to "the executors of" her former husband, through whom she had other shares, and her making payment on them by check on a bank account kept in her individual name. But see, *contra*, *Rice v. Railroad Co.*, 32 Ohio St. 380 (1877), where it was held that such intention must appear in the instrument. In this case, however, there was no separate benefit to the wife or her estate.

⁶ *Davies v. Jenkins*, L. R. 6 Ch. D. 728 (1877).

⁷ *Patton v. Kinsman*, 17 Iowa 428 (1864); *Cowles v. Morgan*, 32 Ala. 535 (1859); *Avery v. Van Sickle*, 10 Cent. L. J. 33; 35 Ohio St. 270 (1879); *Schaffroth v. Ambs*, 46 Mo. 114 (1870); *Whitesides v. Cannon*, 23 Mo. 457 (1856); *Ozeley v. Ikelheimer*, 26 Ala. 332 (1855); *Caldwell v. Sawyer*, 30 *Ib.* 283

judgment against the husband.¹ On the other hand, in an earlier case in England, such a note, given for advances to the husband, was held not to be a charge on the wife's separate estate, but to be an equitable appointment, to be satisfied out of the rents and profits of her estate.²

§ 307. **Implication from Giving Note—Restricted to Cases of Benefit.**—As in the case of her sole note, where the joint note is given for her husband's accommodation or in payment of his debts, no intention to charge her separate estate is to be presumed, if none is expressed.³ But a contract for her own benefit will bind her separate estate.⁴ The plaintiff, however, must either prove that such contract was for her separate benefit or that she charged her separate estate expressly for it.⁵

Where she purchased property and gave her note for it, her intention to bind her separate property by the note has been generally presumed in recent cases.⁶ And this presumption was held to be *conclusive* in a case where she gave a note and mortgage jointly with her husband for the purchase-money of land conveyed to her.⁷ But it was

(1857); *Schaeffer v. Ivory*, 7 Mo. App. 461 (1879). But after divorce granted a court of equity refused in Missouri to enforce such a note against the wife's separate property, *Hooton v. Ransom*, 6 Mo. App. 19 (1878).

¹ *Nunn v. Givhan*, 45 Ala. 370 (1871).

² *Field v. Sowle*, 4 Russ. 112 (1827).

³ *Frecking v. Rolland*, 1 J. & S. 499 (1871); S. C., 53 N. Y. 422; *Knox v. Jordan*, 5 Jones Eq. 175 (1859); *Johnson v. Malcolm*, 6 *Id.* 120 (1860); *Saulsbury v. Weaver*, 59 Ga. 254 (1877); *Bartington v. Bradley*, 16 La. An. 310 (1861).

⁴ *Van Allen v. Humphrey*, 15 Barb. 555 (1853). But see, *contra*, *Jones v. Crossthwaite*, 17 Iowa 393 (1864).

⁵ *White v. McNett*, 33 N. Y. 371 (1865).

⁶ *Huff v. Wright*, 39 Ga. 41 (1869); *Allen v. Fuller*, 118 Mass. 402 (1875); *Stevens v. Reed*, 112 Mass. 515 (1873); *Stewart v. Jenkins*, 6 Allen 300 (1863); *Webb v. Hoselton*, 4 Neb. 308 (1876).

⁷ *Avery v. Van Sickle*, 35 Ohio St. 270 (1879). "Where a married woman," said Boynton, J., p. 276, "acquires the title to property by purchase, which becomes, by force of the statute, her separate estate, and executes her promissory note therefor, an implication arises, in the absence of proof showing a different understanding, that she thereby intended to charge her separate estate with its payment." Nor is this liability changed by her giving a mortgage as collateral, *Id.*; *Rogers v. Ward*, 8 Allen 387; *Ballin v. Dillaye*, 37 N. Y. 35; nor merged in a judgment on the note against the husband alone, *Avery v. Van Sickle*, *supra*.

denied altogether in another and similar case, where it was held that no other security than that given was intended, and that the intention to charge her separate estate must either be expressed or implied *in the contract*.¹ This has been also declared to be the rule in Tennessee, in the case of a joint note given by husband and wife for goods purchased.²

§ 308. **Implied Charge—Where Credit Given Wife.**—The fact that, in the contract of a married woman, credit has been given only to her and her estate will be considered as an element of importance, and her separate estate is often held in equity on this ground to be charged with the debt contracted.³ This was held to be the rule in New York, before the Act of 1860, where a note of the husband was guaranteed by the wife and discounted by the plaintiff on the credit of her separate estate.⁴ It was held sufficient to bind a married woman's separate property for her contract, if either her separate benefit or a separate credit to her be shown.⁵ And it has been held in New York, in a recent case, that the fact of a note being discounted on the credit of the wife's separate estate will render such estate liable, without any intention to charge such estate or any proof of benefit to her or to it.⁶ And this has been held to be true of a note given by husband and wife for family supplies sold to them on the credit of a farm, which belonged to the wife and was carried on jointly by both.⁷ And even where the wife has no other separate estate she is liable for goods purchased by her on her own credit, at least in New York;⁸ and in Massachu-

¹ *Kimm v. Weippert*, 46 Mo. 546 (1870), Wagner, J., saying: "The intent to be of any importance must be a part of the contract; that is, the true meaning of the contract, when justly interpreted, must be that the debt which it creates should be a charge upon the estate."

² *Cherry v. Clements*, 10 Humph. 552 (1850); *Litton v. Baldwin*, 8 *Ib.* 209.

³ *Noyes v. Blakeman*, 3 Sandf. 535 (1850). But the interest of a *cestui que trust* is not such an estate, *Noyes v. Blakeman*, 6 N. Y. 567 (1852).

⁴ *Sexton v. Fleet*, 2 Hilt. 477 (1859).

⁵ *Dickerman v. Abrams*, 21 Barb. 551 (1854).

⁶ *Quassaic Nat. Bank v. Waddell*, 1 Hun 125 (1874); S. C., 3 T. & C. 680.

⁷ *Krouskop v. Shontz*, 51 Wis. 204 (1881).

⁸ *Crisfield v. Banks*, 24 Hun 159 (1881).

setts, under like circumstances, on a note given for the goods.¹ So, if a wife is living separate from her husband, he living abroad, her note discounted on her individual credit will be considered, in equity, as intending to bind her separate estate and will bind it.²

§ 309. **Charge Implied from Separate Benefit.**—The benefit to a wife's separate estate is an element of great importance in equity in determining its liability. Her separate estate is liable in equity for money advanced or loaned for the separate benefit of herself or her estate;³ even though the loan is made by her husband;⁴ and though her separate property is managed by her husband and the proceeds of the loan are paid to him.⁵ So, her separate estate will be liable for work done on it for its benefit at her request;⁶ or for goods purchased for its benefit;⁷ even though her husband has given his note for such purchases.⁸

So, a wife's separate estate will be liable on her covenants relating to it in a conveyance of it by her.⁹ But where she has sold land and taken back a mortgage for part of the purchase-money and assigned that with a guaranty, it has been held that her separate estate was not liable on such guaranty without evidence of an express charge or of sepa-

¹Allen v. Fuller, 118 Mass. 402 (1875).

²McHenry v. Davies, L. R. 10 Eq. 88 (1870). In this case the maker of the note, to whom credit was given by a banker in Paris, was to all appearance, and so far as he knew, unmarried. The Master of the Rolls adopts the expression of Turner, L. J., in Johnson v. Gallagher, 3 DeG. F. & J. 521, that "the court is bound to impute to her the intention to deal with her separate estate unless the contrary is clearly proved."

³Pentz v. Simonson, 2 Beas. 232 (1861).

⁴Gardner v. Gardner, 7 Paige 112 (1838), affirmed 22 Wend. 526.

⁵Smith v. Kennedy, 13 Hun 9 (1878).

⁶Colvin v. Currier, 22 Barb. 371 (1856).

⁷North Am. Coal Co. v. Dyett, 7 Paige 9 (1837), affirmed 20 Wend. 570 (1838).

⁸Cater v. Eveleigh, 4 Desaus. 19 (1809); Guion v. Doherty, 43 Miss. 538 (1871); Clopton v. Matheng, 48 Ib. 285 (1873). And it seems that in Mississippi contracts for such supplies may be made by either husband or wife without consent of the other and bind the wife's separate estate, Clopton v. Matheng, *supra*.

⁹Kolls v. De Lever, 41 Barb. 208 (1864). But such liability is confined to covenants made for the separate benefit of herself or her estate, Coakley v. Chamberlain, 38 How. Pr. 483 (1869).

rate benefit to her estate.¹ On the other hand, liability of her separate estate in equity for the payment of a note given for her separate benefit remains unchanged in New York by the acts of 1848 and 1849.² On the ground of separate benefit, a wife's estate has been held liable for her draft.³ So, for her note given for work on land held jointly by herself and husband as co-tenants.⁴ But not without proof of separate benefit or an intention to charge her separate estate for a note given in the joint business of herself and husband.⁵

§ 310. **Charge Implied from Benefit—Notwithstanding Joint Note with Husband.**—In equity a wife's separate estate is liable for the joint bond of herself and husband given for the wife's debt,⁶ or their joint note given for building or other improvements on the wife's land.⁷ But in Kentucky it has been held that the wife's general estate will be liable on such a note without express charge, but not her separate estate.⁸ Her separate estate is, however, liable for cattle or implements purchased for her farm and secured by the joint note of herself and husband,⁹ or by her individual note,¹⁰ or without any note.¹¹ But in Texas, where the joint note of husband and wife was given for such supplies, it was held that they were not for the benefit of the wife's separate property within the meaning of the statute.¹²

¹ *White v. McNett*, 33 N. Y. 371 (1865), Denio, C. J., *diss.*

² *Coon v. Brook*, 21 Barb. 546 (1856).

³ *Brooks v. Wigginton*, 14 La. An. 687 (1859); although given without the authorization of her husband, *Ib.*

⁴ *Burr v. Swan*, 118 Mass. 588 (1875).

⁵ *Palen v. Lent*, 5 Bosw. 713 (1860).

⁶ *Forrest v. Robinson*, 4 Port. 44 (1836).

⁷ *Parker v. Kane*, 4 Allen 346 (1862). And in Louisiana, on her own note, if authorized by her husband to give it, *Jordan v. Anderson*, 29 La. An. 749 (1877).

⁸ *Marshall v. Miller*, 3 Metc. 333. (Ky. 1860). The note in this case was given for necessary supplies to the wife's farm, on which husband and wife and their family lived.

⁹ *Mitchell v. Smith*, 32 Iowa 484 (1871).

¹⁰ *Batchelder v. Sargent*, 47 N. H. 262 (1867).

¹¹ *McCormick v. Holbrook*, 22 Iowa 487 (1867).

¹² *Wallace v. Finberg*, 46 Tex. 35 (1876).

§ 311. **Charge Implied from Purchase of Separate Property.**—Where a wife has purchased land and, in part payment for it, indorsed a note given by the vendor to a third person, and has afterward reconveyed the land to the vendor, her agreement to pay the note is without any separate benefit to her and will not bind her separate estate.¹ Although where she has purchased a farm and manages it as her own, her note given in payment for it is for her separate benefit and renders her estate liable.² But it has been held in New Hampshire that her separate estate will not be liable on her note given for money borrowed and used by her to purchase land for her separate property.³ So, in Iowa it has been held that a contract for the purchase of real estate is not “in regard to her separate property” within the meaning of the statute.⁴ On the other hand, a wife’s separate estate has been held to be presumptively benefited and liable on her note given for the purchase of stock;⁵ or of a piano;⁶ or, given with her husband, in payment of a store bill;⁷ or, by herself alone, for family supplies.⁸ And, by force of the statute, in Iowa even for goods sold for family use to the husband.⁹ And in Texas for such goods sold to the husband, he being insolvent.¹⁰ But in New York such liability for goods purchased by her husband exists only where he has acted as her agent.¹¹

§ 312. **Separate Benefit Must Appear.**—The mere fact that money has been paid at the wife’s request will not be suffi-

¹Atkinson v. Richardson, 74 N. C. 455 (1876).

²Chapman v. Foster, 6 Allen 136 (1863); Stewart v. Jenkins, *Id.* 300.

³Ames v. Foster, 42 N. H. 381 (1861).

⁴Jones v. Crossthwaite, 17 Iowa 393 (1864).

⁵Williams v. King, 43 Conn. 569 (1876).

⁶Phillips v. Graves, 20 Ohio St. 371 (1870).

⁷Williams v. Urmston, 35 Ohio St. 296 (1880).

⁸Collins v. Lavenberg, 19 Ala. 682 (1851).

⁹Finn v. Rose, 12 Iowa 565 (1861); Iowa Code § 1455.

¹⁰Brown v. Ector, 19 Tex. 346 (1857); Texas Statute of 1848; Hart Dig. §§ 2423, 2424. But it is not sufficient for this purpose to aver that a joint note was made by a husband and wife for the purchase of family supplies by the wife, Laird v. Thomas, 22 Tex. 276 (1858).

¹¹De Mott v. McMullen, 8 Abb. Pr. (N. Y.) 335 (1869); N. Y. Act of 1860 c. 90 § 1.

cient of itself to bind her separate estate without evidence that it was for such estate,¹ or for her separate benefit.² So, in Louisiana, her note is void unless it be shown that she has a separate estate and that the note was given for her separate benefit.³ So, in Michigan, though a note be expressed to be for money loaned her, it will not render her liable without evidence of its relating to or benefiting her separate property.⁴ And the words "value received" will not relieve the holder from the burden of proving benefit to the wife.⁵ This is true especially in the case of a holder having notice of the actual state of things, and the payee's declarations to him are admissible as evidence of such notice.⁶

The defense to a married woman's note on the ground of want of separate benefit to her cannot now, it seems, be set up in Louisiana against a *bona fide* holder for value before maturity;⁷ although it was formerly held otherwise, as a principle of the Spanish law, in the case of a joint note of the husband and wife, which acknowledged the borrowing of the money for her separate use and was in the hands of a *bona fide* holder for value.⁸

But it is immaterial whether the funds borrowed for the avowed benefit of a wife's separate estate have been so used, if the note was given for such express purpose.⁹ Under the Pennsylvania statute, however, her separate estate will not be liable upon a note if the consideration borrowed expressly for such estate has been diverted.¹⁰

¹Wright v. Dresser, 110 Mass. 51 (1872).

²Ledelliey v. Powers, 39 Barb. 555 (1863); S. C., 25 How. Pr. 240.

³Graham v. Thayer, 29 La. An. 75 (1877); Urquhart v. Thomas, 24 Ib. 95 (1872).

⁴Johnson v. Sutherland, 39 Mich. 579 (1878).

⁵Tracy v. Keith, 11 Allen 214 (1865).

⁶Pilcher v. Kerr, 7 La. An. 144 (1852).

⁷Reardon v. Moriarty, 30 La. An. 120 (1878).

⁸Beauregard v. Eimer, 7 La. An. 293 (1852), the court saying: "It is a principle that has come down to us from the laws of Spain."

⁹McVey v. Cantrell, 70 N. Y. 295 (1877).

¹⁰Heugh v. Jones, 32 Penna. St. 432 (1859). Her statutory liability for "debts contracted by herself" (Act of 1848) extends only to the following:

And, in general, where a wife's note is given for a loan and the money has been paid to her husband, no separate benefit appearing, her separate estate will not be liable;¹ even though the husband, obtaining the money on such a note, has represented it to be for the wife's separate benefit.² And in New York, as the law now stands, a married woman's note to her husband's order is presumptively void, and it must be proved that she had a separate estate and gave the note to benefit or charge it.³ In Mississippi, even where the husband is his wife's agent managing her plantation, and gives notes as such, it must be proved that the money borrowed was actually used for necessary supplies, or otherwise for the benefit of her separate property, in order to render her liable.⁴ And this is so in Louisiana, where the wife herself gives the note with her husband's authority, but without the statutory authorization of a judge.⁵ To make her notes valid it must there be shown that she was authorized by her husband and that the debt was for her separate benefit.⁶ And, in Mississippi, to render her separate estate liable on a joint note given with her husband for money borrowed, her separate benefit must be clearly shown.⁷ This is also true in Louisiana, where she had authorization to give notes and to mortgage her separate property for certain purposes and amounts, and made notes and mortgages for other amount and purpose.⁸ In Texas she can only bind her separate

"1st. Debts contracted before marriage whilst she was competent to contract or afterwards as a *feme sole* trader. 2d. Debts for necessities after her husband has deserted her or neglected and refused to support her. 3d. And possibly debts contracted for the improvement of her separate estate where the money is so applied," *Ib.*

¹ *Pendergast v. Borst*, 7 Lans. 489 (1872).

² *Deck v. Johnson*, 2 Keyes 348 (1866).

³ *Second Nat. Bank v. Muller*, 63 N. Y. 639 (1875).

⁴ *Wright v. Walton*, 56 Miss. 1 (1878).

⁵ *Adams v. Curry*, 15 La. An. 485 (1860); *Hardin v. Wolf*, 29 La. An. 333 (1877). And by Louisiana law a wife's separate property is liable for her proportion of the household expenses and for the whole of such expenses, if her husband is unable to pay them, *Ib.*

⁶ *Thomson v. Chick*, 19 La. An. 206 (1867).

⁷ *Stokes v. Shannon*, 55 Miss. 583 (1878).

⁸ *Conrad v. Le Blanc*, 29 La. An. 123 (1877).

property by simple contract, alone or jointly with her husband, for necessities for herself or her family or for her separate property.¹

§ 313. **Separate Benefit—Presumption to Contrary.**—In New York, in the absence of proof of her separate benefit, a joint bond and mortgage with her husband will be presumed to be for his debt and benefit.² And her separate estate will not be liable for such debt and benefit without benefit to herself.³ So, in Ohio, her separate estate will not be bound by her indorsement as surety for her husband;⁴ nor, in North Carolina, by her note as such surety without reference to her separate estate and without consent of her husband, she not being a sole trader.⁵

And, in general, a wife's separate estate will not be bound by the joint note of husband and wife executed by her as surety;⁶ nor, in the absence of proof of separate benefit, by her note and mortgage given for a loan to her husband.⁷ In Kansas, however, where a wife's note is given for her husband's debt, her intention to charge her separate estate will be presumed.⁸ So, in Alabama, where she has given a joint note with her husband in settlement of a judgment against him.⁹ And, in New York, where she has given such a joint note with him, as a surety for him, expressly making it a "lien and claim" against her separate estate, such separate estate as she may have at the time judgment is rendered will be liable for its payment.¹⁰ But where there is no expression

¹*Rhodes v. Gibbs*, 39 Tex. 432 (1873).

²*Goodall v. McAdam*, 14 How. Pr. 385 (1857).

³*Ledlie v. Vrooman*, 41 Barb. 109 (1863).

⁴*Levi v. Earl*, 30 Ohio St. 147 (1876).

⁵*Webb v. Gay*, 74 N. C. 447 (1876).

⁶*Saulsbury v. Weaver*, 59 Ga. 254 (1877); *Bartington v. Bradley*, 16 La. An. 310 (1861).

⁷*Taylor v. Carlile*, 2 La. An. 579 (1847); La. C. C. § 2412; *Thomson v. Chick*, 19 La. An. 206 (1867); *Lee v. Cameron*, 14 *Ib.* 711 (1859). Although the note may have been authorized by her husband, *Perry v. Thompson*, 3 La. An. 188 (1848); *Bowles v. Turner*, 15 *Ib.* 352 (1860).

⁸*Deering v. Boyle*, 8 Kans. 525 (1871); *Wickes v. Mitchell*, 9 *Ib.* 80 (1872).

⁹*Nunn v. Givhan*, 45 Ala. 370 (1871).

¹⁰*Todd v. Ames*, 60 Barb. 454 (1871).

amounting to a charge, and no benefit to her or her estate, it will not be bound by such a note;¹ even though the money, obtained on such note for the purpose of paying her husband's debts, be paid to and acknowledged by her.² She may, however, be estopped by her fraud from availing herself of the presumption in her favor against the existence of a separate benefit to her.³

Under the Connecticut statute a wife's separate estate has been held not to be liable on a joint note with her husband for his debts, although it contain the words "each intending hereby to charge our individual estate."⁴ And her joint note with her husband without any such expression is not presumptively within the statute which makes her liable on all contracts for "the benefit of herself, her family, or her separate or joint estate."⁵ So, in Michigan, the wife's note made jointly with her husband, without any consideration to her except on the part of, and proceeding from, her husband, is not binding on her or her estate.⁶

¹ *Coats v. McKee*, 26 Ind. 223 (1866).

² *Bisland v. Provosty*, 14 La. An. 165 (1859).

³ *Henry v. Gauthreaux*, 32 La. An. 1103 (1880).

⁴ *Smith v. Williams*, 33 Conn. 409 (1876).

⁵ *Way v. Peck*, 47 Conn. 23 (1879); G. S. 417 § 9.

⁶ *Reed v. Buys*, 44 Mich. 80 (1880). See, too, *Richards v. Proper*, *Id.* 96.

III. RIGHTS OF HUSBAND.

- 314. Contracts between Husband and Wife.
- 315. Husband and Wife in the United States.
- 316. Actions between Husband and Wife—by Indorsee.
- 317. Acquisition and Transfer—Before or After Marriage.
- 318. Wife as Agent of Husband.
- 319. Husband's Right to Choses in Action of Wife.
- 320. Actions by and against Married Woman.
- 321. Payment to Husband or Wife.
- 322. Transfer by Husband or Wife.
- 323. Wife's Property—Liability for Husband's Debts.
- 324. Husband's Liability for Ante-nuptial Debts.
- 325. Rights of Survivorship.
- 326. Reduction to Possession.

§ 314. **Contracts between Husband and Wife.**—At common law the personal identity of husband and wife rendered void all contracts between them. And this rule remains in many States unchanged notwithstanding the recent statutes that have been referred to. According to this rule a bill of exchange or note made by husband to wife, or *vice versa*, is void.¹ A husband cannot indorse and deliver a note to his wife so as to pass a valid title to her as against his assignee.² And it has been held that a note by husband to wife is so absolutely void that it cannot even be ratified by a subsequent promise of payment made by the husband to a subsequent holder.³ So, a note made by a wife to her husband and the indorsement of it by him are both invalid.⁴ And where a husband has given a note to his wife for a debt due her at the time of her marriage, she cannot, it is said, bring an action upon it against his executor.⁵ And it has even been held that if the wife has made advances for the payment of her husband's debts, and he has given his note for

¹ *Roby v. Phelon*, 118 Mass. 541 (1875); *Hooker v. Boggs*, 63 Ill. 161 (1872); *Sweat v. Hall*, 8 Vt. 187 (1836); *Garner v. Sheriff*, 26 La. An. 375 (1874). But such a note given for money borrowed at the time may be enforced in equity, *Huston v. Cone*, 24 Ohio St. 11 (1873).

² *Gay v. Kingsley*, 11 Allen 345 (1865); *Seyfert v. Edison*, 16 Vroom 393 (1883).

³ *Sweat v. Hall*, 8 Vt. 187 (1836).

⁴ *Roby v. Phelon*, 118 Mass. 541 (1875). So, too, a husband's note payable to his wife and indorsed by her, *Hooker v. Boggs*, 63 Ill. 161 (1872).

⁵ *Jackson v. Parks*, 10 Cush. 550 (1852).

that consideration to an assignee of her claim, it will be void as against his estate.¹ So, if the husband gives to his wife for a valuable consideration a note payable to her or bearer, no action can be brought on it by the bearer.² In like manner, the husband will not be liable on a note given to his wife for her money used in building his house,³ or for property received from her which had not been held for her separate use.⁴

But in equity such a note given for advances by the wife is equivalent to a declaration of trust.⁵ So, a note given to her for her distributive share of her father's estate which had been collected by her husband.⁶ And it seems that where the husband's creditors are not prejudiced by a gift made by him to his wife of a note, although such gift is legally void, the note will be enforced in equity in the wife's favor against the maker.⁷

§ 315. **Husband and Wife in the United States.**—In some of the United States the husband's estate is held liable to the wife on a note made by the husband to her for money loaned.⁸ And where the wife makes a note to her husband, it has been held sufficient to bind her separate estate in the hands of an indorsee.⁹ So, if a husband with others gives a note to his wife for money loaned by her as administratrix, it will survive to her on his death and be valid against his estate.¹⁰ And a note transferred by a husband to his wife, in consideration of a previous loan by her, has been held to be valid against his creditors.¹¹

In Alabama it has been held that an indebtedness by the

¹ *Phillips v. Frye*, 14 Allen 361 (1867).

² *Ingham v. White*, 4 Allen 412 (1862).

³ *Turner v. Nye*, 7 Allen 176 (1863).

⁴ *Patterson v. Patterson*, 45 N. H. 164 (1863).

⁵ *Murray v. Glasse*, 23 L. J. Ch. (N. S.) 126.

⁶ *McC Campbell v. McC Campbell*, 2 B. J. Lea 661 (1879).

⁷ *Tullis v. Fridley*, 9 Minn. 79 (1864).

⁸ *Logan v. Hall*, 19 Iowa 491 (1865); *Bryant v. Bryant*, 3 Bush 155 (1867).

⁹ *Morrison v. Thistle*, 67 Mo. 596 (1878).

¹⁰ *Richards v. Richards*, 2 B. & Ad. 447 (1831).

¹¹ *Clough v. Russell*, 55 N. H. 280 (1875).

husband to the wife for money used by him which belonged to her separate estate may be enforced as a debt against him or his estate.¹ And in Pennsylvania, since the act of 1848, a note executed by the husband when solvent, to his wife, for her distributive share of her father's estate received by him, is a valid claim in her favor against his estate on his subsequent insolvency.² And in Mississippi under similar circumstances it was held that such a note was properly provable against the husband's estate in bankruptcy and was discharged like any other claim after proof and dividend.³ So, it has been held in New York that a note by a husband to his wife subsequently paid by a bill of sale of property from him to her will be valid against his creditors.⁴ So, in Louisiana, a note given by the husband's firm to his wife for a loan of her paraphernal property will sustain a recovery against the firm in a suit by the husband and wife.⁵ And in Massachusetts, since the act of 1874, a wife may indorse a partnership note of her husband's firm for accommodation of the firm, and such indorsement will be valid between the original parties.⁶

§ 316. **Action between Husband and Wife—By Indorsee.**—At common law no action could be brought by the wife against her husband during coverture. It seems, however, that after divorce *a vinculo* she may sue her husband in Maine for money loaned to him and secured by his note to her during coverture.⁷ And in Nebraska she may by statute sue her husband pending coverture on his note given to her.⁸

Notwithstanding the recent changes in the law relating to this subject a wife's note to her husband, where not otherwise provided by statute, is presumptively void; and in order to render her separate estate liable in New York on such a note

¹Rowland v. Plummer, 50 Ala. 182 (1874).

²Ziegler's Appeal, 84 Penna. St. 342 (1877).

³Thomas v. Thomas, 45 Miss. 263 (1861).

⁴Savage v. O'Neil, 44 N. Y. 298 (1871).

⁵Drake v. Hays, 27 La. An. 256 (1875).

⁶Kenworthy v. Sawyer, 125 Mass. 28 (1878).

⁷Webster v. Webster, 58 Me. 139 (1870).

⁸May v. May, 9 Neb. 16 (1879); G. S. 528 § 31.

her separate benefit and an intention to charge her separate estate must appear.¹

If the note has been transferred by the husband's indorsement, it will be good between him and his indorsee, without regard to the question of the legality of the original contract between husband and wife.² But a note made by the husband to the order of his wife for money due her comes to her indorsee subject to all equitable defenses, notwithstanding its indorsement after maturity by both husband and wife.³

§ 317. **Subsequent Marriage—Acquisition or Transfer after Marriage.**—The subsequent marriage of the maker and the payee of a note will not render it void, and in New York the wife, being the payee, can recover upon it at law.⁴ In Massachusetts, however, such subsequent marriage has been held to annul the note, and it cannot be revived by the death of the husband.⁵ And where the maker of a note afterwards marries and the note is transferred subsequently to her husband, it is thereby extinguished and cannot be revived by its subsequent transfer by him.⁶ In Arkansas it has been held that where the maker and payee of a note subsequently marry, although by the ante-nuptial contract notes belonging to the wife do not pass to the husband, her right of action against her husband being lost by marriage destroys also her right to recover against the surety on the note.⁷

Where a note made to the wife and indorsed by her comes afterwards into the possession of the husband by an indorsement in blank he may bring suit upon it as the holder.⁸ And it has been held that he may sue upon a note to his wife transferred to him after marriage by direct delivery from her.⁹ And where a note made by the husband to a third

¹Second Nat. Bank v. Muller, 63 N. Y. 639 (1875).

²Haly v. Lane, 2 Atk. 182; Robertson v. Allen, 3 Baxter 233 (1873).

³Beard v. Dedolph, 29 Wis. 136 (1871).

⁴Wright v. Wright, 59 Barb. 505 (1871).

⁵Abbott v. Winchester, 105 Mass. 115 (1870).

⁶Chapman v. Kellogg, 102 Mass. 246 (1869).

⁷Govan v. Moore, 30 Ark. 667 (1875).

⁸Ahrens v. State Bank, 3 So. Car. 401 (1871).

⁹White v. Callinan, 19 Ind. 43 (1862).

person has been transferred by indorsement to the wife and by her to the plaintiff, the husband is unquestionably liable upon it to the holder.¹ In New York it is held that a note which is the separate property of the wife may be transferred by her to her husband as if she were sole.² And equity will enforce an agreement made by the husband in consideration of his wife's release of dower to transfer to her a note received from the sale of land.³ In Massachusetts it has been held that a good title to a bill of exchange will pass by the wife's indorsement, notwithstanding that she had received the bill by indorsement and delivery from her husband.⁴ But his delivery of a note to her with authority to collect it will not transfer the title.⁵ In Kentucky the transfer of a note by husband to wife as her separate property will be good except as against him.⁶

It has been held that if one who is indebted under a judgment, transfers a note without indorsement to his wife, and she disposes of it in exchange for other property, such property will be chargeable in her hands with payment of the judgment.⁷ But where the rights of creditors are not in question, the husband's direction to make a note for money due him payable to his wife will be a good gift to her.⁸ And such a gift will be supported in equity under an agreement made in consideration of her release of dower.⁹

§ 318. **Agency of Husband and Wife for One Another.**— Sometimes a bill or note is signed by the wife as her husband's agent. In such case her authority must be proved by the person seeking to recover on the paper.¹⁰ Without

¹ *Russ v. George*, 45 N. H. 467 (1864).

² *Sheldon v. Clancy*, 42 How. Pr. 186 (1870).

³ *Ward v. Crotty*, 4 Metc. 59 (Ky. 1862).

⁴ *Slawson v. Loring*, 5 Allen 240 (1862).

⁵ *Carley v. Green*, 12 Allen 104 (1866).

⁶ *Martin v. Curd*, 1 Bush 327 (1866).

⁷ *Brown v. Matthaus*, 14 Minn. 205 (1869).

⁸ *Reed v. Reed*, 52 N. Y. 651 (1873).

⁹ *Maraman v. Maraman*, 4 Metc. 84 (Ky. 1862).

¹⁰ *Goldstone v. Tovey*, 6 Bing. N. C. 98; S. C., 6 Scott 394. Although in purchases for domestic use a wife's agency for her husband will be presumed, *Dunn v. Raynor*, 7 N. J. Law J. 82 (N. J. Sup. Ct. 1884).

such proof the husband will not be liable on a note signed by his wife; and where such signature has been prohibited and the fact is known by the holder, he cannot recover.¹ The same thing is true of the husband's liability on his wife's indorsement.² Where, however, a draft, which is the property of the husband, is made to the order of the wife and indorsed by her by his authority, he will be liable.³

And his authority may be implied. Thus, he has been held liable, in New York, for the payment of her note given for furniture purchased by her for a boarding house kept by her, in which her husband and children lived;⁴ but not, in general, on her note given for goods purchased by her without his knowledge.⁵ And where the wife elopes from her husband, he cannot be held liable on her contract by reason of any implied agency.⁶ But he may be held liable on a note given by her in the course of business carried on by her with his knowledge as a sole trader.⁷ In like manner, if payment of a draft is made to the wife of the payee's attorney, who had authorized his wife during his absence to receive certain other moneys, such payment will not be binding without proof of her authority in this particular case.⁸ So, in order to make a wife's payment, on account of her husband's note, available as a bar to the Statute of Limitations, her agency must be shown.⁹ The agency of the wife for her husband is ordinarily a question of fact for the jury.¹⁰ This has been held to be so in New York where a wife gave

¹ *Rekeart v. Sanford*, 5 Watts & S. 164 (1843).

² *Leeds v. Vail*, 15 Penna. St. 185 (1850).

³ *Hancock Bank v. Joy*, 41 Me. 568 (1856).

⁴ *Switzer v. Valentine*, 10 How. Pr. 109 (1854).

⁵ *Moses v. Fogartie*, 2 Hill 335 (So. Car. 1834).

⁶ *Hatchett v. Baddeley*, 2 W. Bl. 1079.

⁷ *Abbott v. McKinley*, 2 Miles 220 (1838). And his authority to her to carry on business as a sole trader may be inferred from his conduct, *Prince v. Brunatte*, 1 Bing. N. C. 435.

⁸ *Day v. Boyd*, 6 Heisk. 458 (1871).

⁹ *Butler v. Price*, 115 Mass. 578 (1874).

¹⁰ *Lord v. Hall*, 8 C. B. 627 (1849), she having indorsed in his name a note payable to him.

a note in her own name for horses bought by her for a farm which she carried on.¹

A general power of attorney to a husband to make notes and transact other business for his wife will not include authority to make accommodation paper.² Nor will a general power of attorney in Louisiana authorize a husband to indorse a bill of exchange in his wife's name.³ And it has been held that an authority given by the husband to his wife to give a note will not cover a note given by her in her own name without reference to such authority.⁴ Nor will a power given by a man to his wife "for me and in my behalf to accept such bill of exchange as shall be drawn on me by my agents" include bills of exchange drawn by the husband's firm.⁵ Where a bill of exchange drawn on a husband has been accepted by his wife in her own name, he may make the acceptance his by ratification, and he may do this by a subsequent acknowledgment of it and promise to pay it.⁶ So, if the wife gives a note in her husband's name in consideration of the surrender of a previous note or bill, he will be bound by a subsequent ratification of the act.⁷

§ 319. **Husband's Right to Chose in Action of Wife.**—Bills of exchange and promissory note and other negotiable instruments are *choses in action* and subject to the rule of law governing such property.⁸ Thus, at common law, a bill or note made to the wife becomes the property of her husband;⁹ even though given to her for her distributive share of a deceased relative's estate.¹⁰ And even a note made to a wife

¹Gates v. Brower, 9 N. Y. 205 (1853).

²Nash v. Mitchell, 8 Hun 471 (1877).

³Laplante v. Briant, 13 La. An. 566 (1858).

⁴Minard v. Mead, 7 Wend. 68 (1831).

⁵Attwood v. Munnings, 1 M. & Ry. 66 (1827).

⁶Lindus v. Bradwell, 5 C. B. 583 (1848). See, too, Cotes v. Davis, 1 Campb. 485.

⁷Shaw v. Emery, 38 Me. 484 (1854).

⁸Gaters v. Madely, 6 M. & W. 423.

⁹Connor v. Martin, 1 Stra. 516; Greenleaf v. Hill, 31 Me. 562 (1850); Thrasher v. Tuttle, 22 Ib. 335 (1843); Dunn v. Hornbeck, 7 Hun 629 (1876); Tuttle v. Fowler, 22 Conn. 58 (1852).

¹⁰Commonwealth v. Manley, 12 Pick. 173 (1831).

as sole trader belonged at common law to the husband, although he was living apart from her and in adultery, and he might recover it after her death from her representatives.¹ But where a note is made to a married woman as payee and retained by her, it belongs to her like other choses in action until reduced to possession by her husband.² Even if made to her before her marriage it will pass to her husband,³ if reduced by him to possession. And although it be not reduced to possession by him, it will still survive to him on her death.⁴ Her liability, however, on a note made by her before marriage and barred by the statute of limitation will not be revived by an acknowledgment of the debt by her husband.⁵

§ 320. **Action by or Against a Married Woman.**—A married woman's power to sue alone did not exist at common law, although she might be enabled to hold property in her own name. If, however, she holds a note in her own name, and as her sole property, she may in some States now bring suit upon it without joining her husband.⁶ In other States, as at common law, the title being in her husband, she cannot bring a suit on the paper in her own name.⁷ Nor can she sue alone although her husband has been absent and not heard from for the period of more than seven years.⁸

Where a note or bill is made payable to the wife, both may join at common law in an action upon it;⁹ or the husband may sue alone.¹⁰ So, the husband may sue upon a note

¹ *Russell v. Brooks*, 7 Pick. 65 (1828).

² *Hoop v. Plummer*, 14 Ohio St. 448 (1863).

³ *Rawlinson v. Stone*, 3 Wilson 1; *Evans v. Secrest*, 3 Ind. 545 (1852); *Holland v. Moody*, 12 *Ib.* 170 (1859), the marriage having in both of these cases taken place before the passage of the Act of 1853; *Tryon v. Sutton*, 13 Cal. 490 (1859).

⁴ *Jones v. Warren*, 4 Dana 333 (1836).

⁵ *Moore v. Leseur*, 18 Ala. 606 (1851).

⁶ *Hadley v. Brown*, 2 Kans. 416 (1864).

⁷ *Kimbro v. First Nat. Bank*, 1 MacArth. 61 (1873).

⁸ *Lake v. Ruffle*, 6 Nev. & M. 684.

⁹ *Byles* 67; 1 *Daniel* 248; *Philliskirk v. Pluckwill*, 2 M. & S. 393; *Arnould v. Revault*, 1 Brod. & Bing. 443; S. C., 4 Moore 70.

¹⁰ *Byles* 67; 1 *Daniel* 248; *Burrough v. Moss*, 10 B. & C. 558 (1830); S. C., 5 M. & Ry. 296; *Sutton v. Warren*, 10 Mete. 451 (1845).

in his own name, although it was made to his wife in her maiden name and the marriage was unknown to the maker.¹ And where an action is brought by the husband on a note made to the wife, a debt of hers cannot be set off against the note.² It has even been held that the husband may proceed in equity without joining his wife for an injunction against a third person to prevent his collecting or disposing of a note belonging to the wife.³ And even where the wife as an administratrix takes a bond payable to herself and husband, it has been held that the husband may sue upon it alone.⁴ And this is true generally as to notes or bills which are the common property of husband and wife.⁵ In Louisiana where a note is made to the wife, and suit is brought on it by husband and wife together, there being no property in the husband, his authority to the wife to have and collect the note will be presumed.⁶ At common law the husband and wife may bring an action jointly on a note made to the wife before marriage;⁷ or the husband may sue upon it alone.⁸ But it was held in New York before the recent statute, that the husband must join the wife in such an action and could not sue upon it alone.⁹

§ 321. **Payment to Husband or Wife.**—Where notes or bills made to the wife are regarded in law as the property of the husband, it is evident that payment should be made to him. And in such case payment to her will not constitute a sufficient defense.¹⁰ On the other hand, payment to him will be a complete defense to an action brought by her, even since the recent statutes, where the note paid was not the separate property of the wife but was made payable to her by her

¹Templeton v. Cram, 5 Me. 417 (1828).

²Burrough v. Moss, 10 B. & C. 558 (1830).

³Clay v. Power, 24 Tex. 304 (1859).

⁴Ankerstein v. Clarke, 4 T. R. 616.

⁵Crow v. Van Sickel, 6 Nev. 146 (1870).

⁶Raiford v. Wood, 14 La. An. 116 (1859).

⁷Philliskirk v. Pluckwell, 2 M. & S. 393.

⁸McNeilage v. Halloway, 1 B. & Ald. 221.

⁹Morse v. Earle, 13 Wend. 271 (1835).

¹⁰Thrasher v. Tuttle, 22 Me. 335 (1843).

husband's consent, having been given for the purchase-money of land, standing in the wife's name because the husband was an alien, and sold by her.¹ So, if property belonging to a man and his wife jointly was sold by them, and the note given in payment was made payable to the husband and paid to him, such payment would bar a recovery by her heirs.²

So, where a note was made payable to the wife at the husband's request as a gift from him, his release of the maker would be a complete defense against her claim.³ And by the civil law where the husband sells a piece of land of which he owns half in his right of community property, and in the other half of which he has a usufruct, and takes notes in payment, he may compromise and settle such notes.⁴ At common law, although a wife might sue and be sued as an unmarried woman after divorce *a mensa et thoro*, a note made to her might be reduced to possession by her husband after such divorce; and in such case payment to him would defeat an action by her.⁵ But a payment made to the husband after a divorce *a vinculo* on a note to the wife, not reduced by him to possession before such divorce, may be recovered by her.⁶ Where, however, by force of recent statute or otherwise, the law recognizes the sole property of the wife in a note or bill made payable to her, payment of it to her husband without her consent will be no defense to an action by her.⁷

§ 322. **Transfer by Husband or Wife—Insolvent Assignments.**—Under the rule of law which transfers to the husband on marriage a note or bill payable to the wife, he only can make a sufficient transfer of it.⁸ And it seems that he

¹Dunn v. Hornbeck, 7 Hun 629 (1876).

²Long v. Walker, 47 Tex. 173 (1877).

³Towle v. Towle, 114 Mass. 167 (1873).

⁴Vinson v. Vives, 24 La. An. 336 (1872).

⁵Dean v. Richmond, 5 Pick. 461 (1827).

⁶Legg v. Legg, 8 Mass. 99 (1811).

⁷Carver v. Carver, 53 Ind. 241 (1876).

⁸Rawlinson v. Stone, 3 Wilson 1; Mason v. Morgan, 2 Ad. & El. 30; Evans v. Secrest, 3 Ind. 545 (1852); Holland v. Moody, 12 Ib. 170 (1859), where the

might transfer such a note notwithstanding a divorce.¹ So, the husband might assign and dispose of a legacy made to his wife for the payment of his debts.² And, in general, all choses in action may be assigned by the husband, if he has the right to reduce them to possession.³ He may transfer his wife's bank share by delivery.⁴ He may assign her choses in action in trust.⁵

But an assignment in bankruptcy by the husband will not carry a note made to the wife before her marriage.⁶ Although, in Massachusetts, the contrary has been held of a note made payable to the wife after her marriage.⁷ It has also been held in the United States that the husband's assignment as an insolvent carries his wife's choses in action.⁸ Although in a later case in Pennsylvania the rule was limited to assignments which expressly include such property.⁹ And notwithstanding an assignment by the husband as an insolvent, her right of survivorship to choses in action not reduced to possession by the husband remains unimpaired.¹⁰ So, an assignment by the husband of his wife's choses in action *as collateral* will not defeat her right of survivorship.¹¹ It has, however, been held in Pennsylvania

marriage was before 1853; *Tryon v. Sutton*, 13 Cal. 490 (1859); *Bayerque v. Haley*, McAll. 97 (1856). In Alabama the code provides for assignment in writing of such note by husband and wife in the presence of two witnesses without personal liability on her part, *Walker v. Struve*, 60 Ala. 167 (1881); Code § 2707.

¹ *Tuttle v. Fowler*, 22 Conn. 58 (1852).

² *Barnes v. Pearson*, 6 Ired. Eq. 482 (1849).

³ *Mattheney v. Guess*, 2 Hill Ch. 63 (1834); *Outcalt v. Van Winkle*, 1 Green Ch. 513 (1838).

⁴ *Forest v. Warrington*, 2 Dess. 254 (1804).

⁵ *Siter's Case*, 4 Rawle 468 (1834).

⁶ *Sherrington v. Yates*, 12 M. & W. 855, reversing *Yates v. Sherrington*, 11 Ib. 42.

⁷ *Smith v. Chandler*, 3 Gray 392 (1855), holding a subsequent transfer by husband and wife to be invalid.

⁸ *Shuman v. Reigart*, 7 W. & S. 168 (1844); *Davis v. Newton*, 6 Metc. 537 (1843).

⁹ *Eshelman v. Shuman*, 13 Penna. St. 561 (1850).

¹⁰ *Van Epps v. Van Deusen*, 4 Paige 64 (1833); *Slaymaker v. Bank of Gettysburgh*, 10 Penna. St. 373 (1849).

¹¹ *Hartman v. Dowdel*, 1 Rawle 279 (1829). But this is questioned in *Siter's Case*, 4 Ib. 472.

that an assignment by the husband will defeat the survivorship of the wife.¹

It follows, from what has been said, that during coverture the wife cannot at common law transfer or indorse effectually a note made to her, inasmuch as the property in the note is vested in the husband.² And even if made to her as a sole trader and indorsed by her for her own debt, it will not be a valid transfer.³ The indorsement must be by the husband, and his indorsement in her name will be insufficient.⁴ But if the wife has purchased a note made by her husband before their marriage, and indorses it with his consent, the note never having been reduced by him to possession, an action will lie in favor of her indorsee.⁵

It seems that an attachment against the husband cannot reach a note made to the wife for a sale of the husband's property and transferred by her before the attachment, especially where the transfer was to a creditor in consideration of necessities furnished.⁶ Nor can the husband's creditors, after his death, reach a note made to the wife in consideration of her release of dower and transferred by her indorsement in her husband's life-time with his consent.⁷ Where a note is made payable to a married woman or bearer, it may be transferred by the joint assignment of husband and wife.⁸ On the other hand, it has been held in Texas that a transfer by the husband without indorsement and as collateral of a note, made payable to the wife's order and given in payment for land which belonged to her, will convey no title without her authority to persons having notice of her rights.⁹

¹ *Richwine v. Heim*, 1 Penr. & W. 373 (Pa. 1830).

² *Connor v. Martin*, 1 Stra. 516.

³ *Barlow v. Bishop*, 1 East 432 (1801). It would be otherwise, it seems, if indorsed by her in his name, *Ib.*

⁴ *Savage v. King*, 17 Me. 301 (1840).

⁵ *Russ v. George*, 45 N. H. 467 (1864).

⁶ *Way v. Pierce*, 51 Vt. 326 (1878).

⁷ *Nims v. Bigelow*, 45 N. H. 343 (1864).

⁸ *Cobb v. Duke*, 36 Miss. 60 (1853).

⁹ *Hamilton v. Brooks*, 51 Tex. 142 (1879); *Rose v. Houston*, 11 *Ib.* 326; *Hemmingway v. Mathews*, 10 *Ib.* 207.

If, however, the wife's note has been transferred by her husband to his creditors, she can only defeat a recovery on it by them by evidence that it was her property and that the purchasers knew that fact.¹

§ 323. **Wife's Property—When Liable for Husband's Debts.**—Courts of equity have long protected the wife's separate property, as we have seen, against the husband's creditors. And similar protection is now afforded at law by many recent statutes. Apart from these, it has been held that a note payable to the wife is liable for her husband's debts and subject to an attachment issued against his property;² especially where the note has been made to her without his consent.³ So, a wife's interest in her deceased father's estate has been held to be subject to an attachment against her husband.⁴ And where a husband and wife have brought a joint action upon a chose in action of the wife, a debt of the husband may be set off against it.⁵ In Pennsylvania, however, it has been held that the wife's choses in action are not subject to an attachment against the husband.⁶ And they will survive to her on the husband's death pending an attachment against him, notwithstanding such attachment.⁷ So, it has been held that a note, made to the wife for her separate estate and never reduced to possession by him, cannot be reached by an attachment against him.⁸ And the court will not compel the husband to reduce such choses in action in order to subject them to an attachment brought against him.⁹

If a note is made payable to the wife, it is presumed under the Alabama Code to be for her separate estate, and will not be subject to such an attachment.¹⁰ And in Massa-

¹ *Moye v. Waters*, 51 Ga. 13 (1874).

² *Shuttlesworth v. Noyes*, 8 Mass. 229 (1811).

³ *Swann v. Gauge*, 1 Hayw. 3 (1791).

⁴ *Vance v. McLaughlin*, 8 Gratt. 289 (1851).

⁵ *Wishart v. Downey*, 15 Serg. & R. 77 (1826).

⁶ *Stoner v. Commonwealth*, 16 Penna. St. 387 (1851).

⁷ *Strong v. Smith*, 1 Metc. 476 (1840).

⁸ *Poor v. Hazelton*, 15 N. H. 564 (1844).

⁹ *Sayre v. Flournoy*, 3 Ga. 541 (1847).

¹⁰ *Saunders v. Garret*, 33 Ala. 454 (1859); Ala. Code §§ 1982, 1985.

chusetts it has been held that a note, given to a wife for partnership property of the husband, sold by him, for which she had found the capital, is her separate property, and in the absence of fraud cannot be attached for his debts.¹ And where a note has been made to a married woman for the rent of land assigned to her for her dower, and suit is brought on it by the husband and wife jointly, a debt of the husband cannot be used in defense as a set-off.² And in Iowa a debt of the husband cannot be pleaded in set-off against a note subsequently assigned to the wife.³ So, in Indiana, a note made payable to the wife since 1853 is her separate property, and a debt of the husband constitutes no set-off against it.⁴ But a note made to the wife or for her use is subject to the set-off of her own ante-nuptial debts, as has been held in a recent action brought on such a note by the payee for the use of the wife.⁵

§ 324. **Husband's Liability for Wife's Ante-nuptial Debts.**—The ante-nuptial debts of the wife become at common law the liability of the husband, but he cannot be sued for such a debt without the wife being joined as defendant.⁶ This liability is done away by statute in some States. Thus, in Texas, husband and wife may be sued together and judgment rendered against both for such debt, but execution for it can only be issued against the wife's property.⁷ At common law the husband's liability for such debts ends with the wife's life-time;⁸ although, so far as she has brought property to her husband, a recovery may still be had against him after her death for her ante-nuptial debt.⁹ The husband's liability for such debts also ends in general with his life and does not

¹ *Worthy v. Clapp*, 99 Mass. 561 (1868).

² *Green v. Carson*, 4 Metc. 76 (Ky. 1862).

³ *Stannus v. Stannus*, 30 Iowa 448 (1870).

⁴ *McCarty v. Mewhinney*, 8 Ind. 514 (1856).

⁵ *Gary v. Johnson*, 72 N. C. 68 (1878).

⁶ Byles 68; 1 Daniel 251; *Mitchinson v. Hewson*, 7 T. R. 348.

⁷ *Roundtree v. Thomas*, 32 Tex. 286 (1869).

⁸ Byles 68; 1 Daniel 251; *Mitchinson v. Hewson*, 7 T. R. 348; *Morrow v. Whitesides*, 10 B. Mon. 411 (1850).

⁹ *Heard v. Stamford*, 3 P. Wm. 409.

extend to his estate.¹ And after his death the original liability of the wife survives against her.²

§ 325. **Survivorship Rights.**—On the husband's death, as has been said, the wife's choses in action, which had not been reduced by him to possession, survive to her and are her property.³ And her choses in action pass upon her death to her personal representatives, and may be sued for by them.⁴ After his death a note or due-bill surviving to her is not subject to any defense which existed against him in his life-time.⁵ Even an assignment by the husband of the wife's choses in action, without any reduction to possession by him or by his assignee, will not defeat the wife's survivorship, as we have already observed.⁶ So, where a wife has retained in her possession until her husband's death a note which was made payable to her, his executor cannot claim it.⁷ And where a note is made to the wife, the husband's assent is to be presumed and it will survive to her.⁸ So, too, where a note is made to the wife by her husband's direction and intended for a gift to her, even though it may remain in his possession until his death.⁹ In like manner, under the rule of law governing joint property, a note or bill made to the husband and wife will survive to the wife after her husband's death.¹⁰

¹ *Cureton v. Moore*, 2 Jones Eq. 204 (1855).

² *Woodman v. Chapman*, 1 Campb. 189 (1808).

³ Byles 67; *Richards v. Richards*, 2 B. & Ad. 447; *Betts v. Kimpton*, 2 B. & Ad. 273; *Gaters v. Madeley*, 6 M. & W. 423 (1840); *Scarpellini v. Atcheson*, 7 Q. B. 864; *Hart v. Stephens*, 6 *Ib.* 937; *Hayward v. Hayward*, 20 Pick. 517 (1838); *Story v. Baird*, 2 Green 262 (N. J. 1834); *Dare v. Allen*, 1 Green Ch. 415 (1841). This is true of a legacy to the wife, *Snowhill v. Snowhill*, *Ib.* 30 (1838); *Revel v. Revel*, 2 Dev. & B. 272 (1837).

⁴ *Allen v. Wilkins*, 3 Allen 321 (1862); *Stearns v. Stearns*, 30 Vt. 213 (1858). And a statement that it "became and was the sole property" of the husband is not a sufficient averment that it was reduced by him to possession, *Ib.* See, too, *Driggs v. Abbott*, 27 Vt. 580 (1855); *Wilson v. Bates*, 28 *Ib.* 765 (1856). But the proceeds in such action belong to the husband by right of survivorship, *Story on Prom. Notes* § 88; 1 *Daniel* 249.

⁵ *May v. Boisseau*, 12 Leigh 512 (1842).

⁶ *Outcalt v. Van Winkle*, 1 Green Ch. 513 (1838).

⁷ *Phelps v. Phelps*, 20 Pick. 556 (1838).

⁸ *Nash v. Nash*, 2 Mod. 133; *Borst v. Spelman*, 4 N. Y. 284 (1850).

⁹ *Scott v. Simes*, 10 Bosw. 314 (1863).

¹⁰ *Philliskirk v. Pluckwell*, 2 M. & S. 393; *Sanford v. Sanford*, 5 Lans. 486;

Where a note to the wife is never reduced by the husband to possession, and both die, the wife dying first, his executor cannot bring suit upon it as on a note made to him.¹ The general rule, however, is that a wife's chose in action on her death survives to her husband without any reduction to possession by him.² And this rule applies to a note bequeathed to the wife and left at her death but never reduced to possession by the husband.³

§ 326. **Reduction to Possession—What.**—It is hardly the province of this work to consider in detail the subject of what constitutes a sufficient reduction to possession by the husband. His indorsement amounts to such reduction;⁴ but not the mere act on his part of receiving interest.⁵ Nor is a legacy to the wife reduced to possession by appropriating a mortgage for its payment and by receipt of interest on it by the husband.⁶ Nor a bond payable to the wife, by a joint receipt by husband and wife.⁷ Nor is a note made to a wife before marriage reduced to possession by the husband's pledging it as security and receiving it again on discharge of the debt.⁸ But where an award was made in the husband's favor of a legacy to the wife, it was held to be a good reduction to possession, defeating her survivorship.⁹

S. C., 61 Barb. 293; *Wilder v. Aldrich*, 2 R. I. 518 (1853); *Sandford v. Sandford*, 45 N. Y. 723 (1871); *Johnson v. Lusk*, 6 Coldw. 113 (1868); *Allen v. Tate*, 58 Miss. 585 (1881); *Richardson v. Daggett*, 4 Vt. 336 (1832); *Draper v. Jackson*, 16 Mass. 480 (1820). But a note made to them jointly for a debt due to him, while it raises a presumption of an intended gift to her, remains his property and under his control during his life, *Pile v. Pile*, 6 B. J. Lea 508 (1890).

¹ *Howard v. Okes*, 3 Exch. 136 (1848).

² *Lee v. Wheeler*, 4 Ga. 541 (1848); *Whitaker v. Whitaker*, 6 Johns. 112 (1810). So, a stock subscription made by the husband in the wife's name, *Stanwood v. Stanwood*, 17 Mass. 57 (1820).

³ *Albee v. Carpenter*, 12 Cush. 382 (1853).

⁴ Byles 68; Story on Prom. Notes § 88; 1 Daniel 250.

⁵ *Hart v. Stephens*, 6 Q. B. 937. And see *McNeilage v. Halloway*, 2 B. & Ald. 218, criticised by Patterson, J., in this case, p. 943.

⁶ *Blount v. Bestland*, 5 Ves. Jr. 515 (1800).

⁷ *Timbers v. Katz*, 6 W. & S. 290 (1843).

⁸ *Latourette v. Williams*, 1 Barb. 9 (1847). And in such case the husband and wife may sue jointly, *Ib.*

⁹ *Oglander v. Baston*, 1 Vern. 396 (1686).

Where there is no reduction the wife's choses in action go by statute in Vermont to her next of kin and not to her husband.¹

Reduction to possession is, in general, a matter of intention and belongs as a question of fact to the jury.² And the absence of such intention may be proved by the admissions of the husband.³ So, the fact that a husband has sold after his wife's death, at a price that was suspiciously low, a promissory note which was her separate property, has been held to support a finding by the jury on the question of reduction in favor of her representatives.⁴ In New Jersey the husband's right to reduce to possession his wife's choses in action was taken away by the act of 1852.⁵

¹Wilson v. Bates, 28 Vt. 765 (1856).

²Hind's Estate, 5 Whart. 138 (1839).

³Gray's Estate, 1 Penna. St. 327 (1845).

⁴Gill v. Cook, 42 Vt. 140 (1869).

⁵Henry v. Dillay, 1 Dutch. 302 (1855); Vreeland v. Schoonmaker, 1 C. E. Green 512 (1863).

CHAPTER X.

CAPACITY—CORPORATIONS AND GOVERNMENTS.

*I. Corporations.**II. Municipal Corporations.**III. Governments.*

I. CORPORATIONS.

327. General Corporate Powers.

328. Commercial Paper—Power to Execute.

330. Power to Receive and Transfer.

332. Banking Laws.

333. Loans by Corporations.

334. Accommodation Paper.

335. Presumption of Validity.

§ 327. **General Corporate Powers.**—Up to this point only natural persons have been spoken of, but the law recognizes also artificial persons, such as corporations, created by itself and possessing in general the same powers as to contracts that natural persons possess. It is, however, a general rule of law that corporations possess only those powers which are expressly conferred by their charter or which belong incidentally and by necessary implication to their very existence as corporations.¹ It was once held to be the rule of the common law that a corporation could only contract under its corporate seal and could not therefore make a promissory note or bill of exchange.²

¹Dartmouth College *v.* Woodward, 4 Wheat. 518 (1819).

²Byles 70; Chitty 20; 1 Parsons 163; Story on Bills § 79; Story on Prom. Notes § 74; Slark *v.* Highgate Archway Co., 5 Taunt. 794; Broughton *v.* Manchester Water Works Co., 3 B. & Ald. 8; Yarborough *v.* Bank of England, 16 East 11; Angell & Ames on Corp. § 236; Lamprell *v.* Guardians of the Poor, 3 Exch. 306; Diggle *v.* London & B. Ry. Co., 5 Ib. 442; Church *v.* Imperial Gas Co., 6 Ad. & El. 846; Mayor, &c., of Ludlow *v.* Charlton, 6 M. & W. 815; East London Water Co. *v.* Bailey, 4 Bing. 283; Arnold *v.* Mayor of Poole, 4 M. & G. 861; Copper Mines Co. *v.* Fox, 16 Q. B. 229. An exception has been made in favor of contracts of slight importance, East London Water Co. *v.* Bailey, *supra*; Australia S. N. Co. *v.* Marzetti, 11 Exch. 234; Church *v.* Imperial Gas Co., *supra*; Beverley *v.* Lincoln Gas Light Co., 6 Ad. & El. 829; London Gas Light Co. *v.* Nicholls, 2 C. & P. 365; and in favor of

The recent requirements of business have, however, greatly multiplied coupon and other corporate bonds of a negotiable form, which are often made payable to bearer, and it is now well established that where a bond is expressly negotiable in form or is clearly intended to be so, it is equivalent substantially to a promissory note.¹ It has also been held that a corporation may make a negotiable bill or note under its corporate seal.² But it has been held in England in recent cases that a corporate bond in negotiable form, which had come into the plaintiff's hands for value after having been stolen from

executed contracts, *Mayor, &c., of Stafford v. Till*, 4 Bing. 75; *East London Water Co. v. Bailey*, *supra*; *Beverley v. Lincoln Gas Light Co.*, *supra*; *Dean of Rochester v. Pierce*, 1 Campb. 466; *Fishmongers' Co. v. Robertson*, 5 Man. & G. 131; *Lowe v. London, &c., Ry. Co.*, 18 Q. B. 633; *Landers v. Guardians of St. Neot's*, 8 *Ib.* 810. But this latter distinction is questionable, *Paine v. Strand Union*, 8 Q. B. 340; *Church v. Imperial Gas Co.*, *supra*. A contract for salvage directly connected with the object of incorporation is binding, although not under seal, *Henderson v. Australian S. N. Co.*, 5 El. & Bl. 409 (1855). So, the employ of an accountant to examine the accounts of a defaulting clerk, *Haigh v. Guardians of N. Brierly*, 1 El. Bl. & El. 873 (1858); or of an engineer to erect an engine, *South Ireland Colliery v. Waddle*, L. R. 3 C. P. 463 (1868), affirmed 4 *Ib.* 617 (1869); or a contract for the use of a dry dock belonging to the contracting corporation, *Wells v. Mayor, &c., of Kingston*, L. R. 10 C. P. 402 (1875).

¹ *Blakely Ordnance Co.*, L. R. 3 Ch. App. 154; *Watson v. Mid Wales Ry. Co.*, L. R. 2 C. P. 593; *Ex parte Chorley*, L. R. 11 Eq. 157; *Dickson v. Vale of Neath Ry.*, L. R. 4 Q. B. 44; *General Estates Co.*, L. R. 3 Ch. App. 758; *Imperial Land Co.*, L. R. 11 Eq. 478. The company being held in these cases on the ground of estoppel arising out of its professed ability to issue negotiable paper under seal. And to like effect, without question of estoppel, *City of Aurora v. West*, 22 Ind. 88 (1864); *Thomson v. Lee County*, 3 Wall. 327 (1865); *Hotchkiss v. National Bank*, 21 Wall. 354 (1874); *Colson v. Arnot*, 57 N. Y. 253 (1874); *Evertson v. National Bank*, 66 *Ib.* 14 (1876); *Carr v. Le Fevre*, 27 Penna. St. 413 (1856); *Morris Canal v. Fisher*, 1 Stock. 699. So, in general, of railroad bonds, *Commissioners of Knox Co. v. Aspinwall*, 21 How. 539; *White v. Vt. & Mass. R. R.*, 21 How. 575 (1858); *Moran v. Comrs. Miami Co.*, 2 Black 722 (1862); *Murray v. Lardner*, 2 Wall. 110 (1876); *Chapin v. Vt. & Mass. R. R.*, 8 Gray 575 (1875); *Brainerd v. N. Y. & N. H. R. R.*, 25 N. Y. 496, affirming 10 Bosw. 332 (1862); *Connecticut Mut. Ins. Co. v. C. C. & C. R. R.*, 41 Barb. 9 (1863); *Birdsall v. Russell*, 29 N. Y. 220 (1864); *Wickes v. Adirondack Co.*, 2 Hun 112 (1874); *Grand Rapid, &c., R. R. v. Sanders*, 17 *Ib.* 552 (1879); *Junction R. R. v. Cleneay*, 13 Ind. 161 (1859); *Langston v. South Car. R. R.*, 2 So. Car. 248 (1870); *National Exchange Bank v. H. P. & F. R. R.*, 8 R. L. 375 (1866). The contrary case of *Jackson v. Y. & C. R. R.*, 48 Me. 147 (1858), is disapproved by *Evertson v. National Bank*, 66 N. Y. 14. This has also been held recently in England of corporation debentures payable to bearer, *In re Imperial Land Co.*, L. R. 11 Eq. 478 (1870); *Ex parte City Bank*, L. R. 3 Ch. App. 758 (1868); but is not the case with debentures which are conditional in their form, *Crouch v. Credit Foncier*, L. R. 8 Q. B. 374.

² *Jackson v. Myers*, 43 Md. 452 (1875); *Muth v. Dolfield*, *Ib.* 466; *Central Nat. Bank v. Charlottesville R. R. Co.*, 5 So. Car. 156 (1873).

the rightful owner, was subject to defense.¹ Whatever may have been the rule originally as to contracts of corporations, it is now established beyond dispute, both in England and in the United States, that a corporation may make a simple contract without using the corporate seal.²

§ 328. **Power to Execute Bills and Notes.**—It is said, however, by Mr. Justice Byles that the power of a corporation to execute commercial paper requires a special authority.³ And it has been held that where express authority has been given to execute such paper for a particular purpose, and the paper has been executed without any recital of the power and actually used for another and unauthorized purpose, the corporation can avail itself of this defense.⁴ Where there is express power given to a corporation to execute a bill or note, the law implies that the corporation is thereby subjected to all ordinary remedies against it incident to such contract.⁵ And it may now be regarded as the rule that all corporations organized and existing for the purposes of trade may in the course of such trade issue bills and notes like natural persons.⁶ The Statute of Anne confers this power expressly as regards the making of notes, and the same power may be implied as to bills.⁷

So far, then, as such bills and notes are incident to the business of the corporation, no express power or capacity is

¹Crouch v. Credit Foncier Co., L. R. 8 Q. B. 374; *In re Natal Investment Co.*, L. R. 3 Ch. App. 355.

²Byles 71 n.; 2 Daniel 496; 1 Parsons 163; Story on Prom. Notes § 74; 1 Dillon Mun. Corp. § 374; Danforth v. Schoharie Turnpike Co., 12 Johns. 227; Bank of Columbia v. Patterson, 7 Cranch 305 (1813); Mechanics' Bank v. Bank of Columbia, 5 Wheat. 326; Legrand v. Hampden College, 5 Munf. 324 (1817); Union Bank v. Ridgely, 1 Harr. & G. 413 (1827); Many v. Beekman Iron Co., 9 Paige 188 (1841); American Ins. Co. v. Oakley, *Id.* 496 (1842); Hamilton v. Lycoming Mut. Ins. Co., 5 Penna. St. 339 (1847); Commercial Bank v. Newport Mfg. Co., 1 B. Mon. 13 (1840); Creswell v. Holden, 3 MacArth. 579 (1879); Hamilton v. Lycoming Mut. Ins. Co., 5 Penna. St. 339 (1847); Buckley v. Briggs, 30 Mo. 452 (1860).

³Byles 71.

⁴Byles 9; Slark v. Highgate Archway Co., 5 Taunt. 792.

⁵Byles 71; Chitty 23; 1 Parsons 167; Murray v. East India Co., 5 B. & Ald. 204.

⁶Broughton v. Manchester Water Works Co., 3 B. & Ald. 1.

⁷Chitty 21; Story on Bills § 79; 6 Anne c. 22.

necessary.¹ But it has been held in England that a corporation organized for the erection of public works has no such power unless expressly conferred;² and that no such power is to be implied in favor of a railroad company,³ although this is not the American rule.⁴ And it has been held in the United States that bills and notes may be made by a mill company,⁵ or a religious corporation,⁶ or an insurance company.⁷ And the same power has been declared to belong to mining companies, manufacturing companies, canal companies, building associations, &c.⁸

¹Story on Bills § 79; Story on Prom. Notes § 74; 1 Edwards § 55; *Moss v. Oakley*, 2 Hill 265 (1842); *Kelly v. Mayor, &c.*, 4 *Ib.* 263 (1843); *Bank of Chillicothe v. Chillicothe*, 7 Ohio 354 (1836); *Moss v. Averell*, 10 N. Y. 449 (1853); *Commercial Bank v. Newport Mfg. Co.*, 1 B. Mon. 13 (1840); *Hascall v. Life Association of America*, 5 Hun 151 (1875); *Green's Brice's Ultra Vir. 155 n.*; *Mott v. Hicks*, 1 Cow. 510 (1823); *Came v. Brigham*, 39 Me. 35 (1854); *Davis v. West Saratoga Bldg. Union*, 32 Md. 285 (1869); *Oxford Iron Co. v. Spradley*, 46 Ala. 98 (1871); *Monument Nat. Bank v. Globe Works*, 101 Mass. 57 (1869); *Barry v. Merchants' Exch. Co.*, 1 Sandf. Ch. 280 (1844); *Partridge v. Badger*, 25 Barb. 146 (1857); *Olcott v. Tioga R. R. Co.*, 40 Barb. 179 (1862); *McCullough v. Moss*, 5 Denio 577 (1846); *Hamilton v. Newcastle, &c., R. R.*, 9 Ind. 359 (1857); *Smith v. Eureka Mills Co.*, 6 Cal. 1 (1856); *Union G. M. Co. v. Rocky Mountain Nat. Bank*, 2 Col. 248 (1873). And this is equally true of a municipal corporation, *Clarke v. School District*, 3 R. I. 199 (1855). And of corporation bonds for money borrowed for corporate purposes, *Curtis v. Leavitt*, 15 N. Y. 9 (1857); *Leavitt v. Blatchford*, 17 N. Y. 521 (1858).

²Byles 71; *Broughton v. Manchester Water Works Co.*, 3 B. & Ald. 1. Nor can a company which is organized for carrying on works abroad, *Peruvian Ry. Co.*, L. R. 2 Ch. App. 617 (1867). In this case, however, the broad language of the memorandum of incorporation was held to include the power.

³*Overend v. Mid Wales Ry. Co.*, L. R. 1 C. P. 499.

⁴*Olcott v. Tioga R. R. Co.*, 40 Barb. 179 (1862); *Smead v. Indianapolis R. R.*, 11 Ind. 104 (1858). And so as to receiving and transferring notes, *Frye v. Tucker*, 24 Ill. 180 (1860); *Goodrich v. Reynolds*, 31 *Ib.* 490 (1863).

⁵*Smith v. Eureka Mills Co.*, 6 Cal. 1 (1856).

⁶*Davis v. Universalist Society*, 8 Metc. 321 (1844).

⁷*Barker v. Mechanics' Ins. Co.*, 3 Wend. 94 (1829). But not where express authority is given by its charter to lend money on certain enumerated securities not including notes or bills, *Bacon v. Mississippi Ins. Co.*, 31 Miss. 116 (1856). Nor where the discounting of the note in question was no part of the company's business, *New York F. I. Co. v. Sturges*, 2 Cow. 664 (1824). Nor where the bill was given in settlement of a claim against another company amalgamated with it by a void deed, although the payee supposed such deed to be valid, *Balfour v. Ernest*, 28 L. J. C. P. 170 (1859).

⁸So held as to a mining company, *Mahoney Mining Co. v. Anglo-California Bank*, Am. L. Reg., Feb., 1882, p. 100, U. S. S. C.; *Moss v. Averell*, 10 N. Y. 449 (1853). So, a society for the erection of a public monument, *Hayward v. Pilgrim Society*, 21 Pick. 270 (1838); or a canal company, *McMasters v. Reed*, 1 Grant Cas. 36 (1854); or a turnpike company, *Lebanon, &c., Road Co. v. Adair*, 85 Ind. 244 (1882); or a manufacturing company, *Mott*

§ 329. But a corporation possesses no power to make a bill of exchange or note which is foreign to its business.¹ And if the note of a corporation has been executed in the transaction of its corporate business, this will not be presumed but must be shown by the holder.² It has been said with some reason that the power of a corporation to make bills and notes is co-extensive with its power to contract debts.³ And a corporation may in general contract debts and borrow money incidentally to its corporate business, and not otherwise.⁴ The power to borrow money, it is said, includes the power to borrow, and therefore to transfer, a bill of exchange;⁵ or to transfer as collateral a promissory note.⁶ The power to borrow money implies power in a corporation to make an "obligation for its repayment in any form not expressly forbidden by law."⁷

v. Hicks, 1 Cow. 513 (1823); *Monument Nat. Bank v. Globe Works*, 101 Mass. 57 (1869); *Narragansett Bank v. Atlantic, &c., Co.*, 3 Mete. 282; *Bird v. Daggett*, 97 Mass. 494; *Auerbach v. Le Sueur Mill Co.*, 28 Minn. 291 (1881); or a building association, *Davis v. West Saratoga Bldg. Union*, 32 Md. 285 (1869).

¹ Thus it is not within the ordinary powers of a railroad company to consolidate itself with another line and to give its note for the purchase of a steamboat, to be used as a means of connection between the lines. *Pearce v. Madison R. R. Co.*, 21 How. 441 (1858).

² *McCullough v. Moss*, 5 Denio 580 (1846).

³ 1 Daniel 356; 1 Parsons 164; 1 Edwards § 55; *Catton v. First Univ. Society*, 46 Iowa 108 (1877); *Pitman v. Kintner*, 5 Blackf. 253 (1839); *Moss v. Oakley*, 2 Hill 265 (1842); *Kelley v. Mayor, &c.*, 4 *Id.* 263 (1843); *Hamilton v. Newcastle, &c., R. R.*, 9 Ind. 359 (1857); *Safford v. Wyckoff*, 4 Hill 442 (1842); *Auerbach v. Le Sueur Mill Co.*, 28 Minn. 291 (1881). And authority to a corporation officer to control its business includes authority to purchase necessary materials and give the corporation's note therefor, *Castle v. Belfast Foundry Co.*, 72 Me. 167 (1881).

⁴ *Fay v. Noble*, 12 Cush. 1 (1853); *Barnes v. Ontario Bank*, 19 N. Y. 156 (1859); *Clark v. Titcomb*, 42 Barb. 122 (1864); *Bank of Chilli-cothe v. Chilli-cothe*, 7 Ohio 359 (1836); *Union G. M. Co. v. Rocky Mountain Nat. Bank*, 2 Col. 248 (1873), affirming 1 *Id.* 532. Thus an insurance company may borrow money to pay losses or raise money for that purpose on a borrowed note, *Furniss v. Gilchrist*, 1 Sandf. 53 (1847).

⁵ *Holbrook v. Basset*, 5 Bosw. 176 (1859); *Central Bank v. Long*, 1 *Id.* 202; *Furniss v. Gilchrist*, 1 Sandf. 53 (1847). So, an insurance company may receive a note for a subscription to stock, without express power to do so, there being no statutory prohibition, *Hope Mutual, &c., Ins. Co. v. Perkins*, 38 N. Y. 404 (1868); and may transfer it, *McIntire v. Preston*, 10 Ill. 48 (1848).

⁶ *Clark v. Titcomb*, 42 Barb. 122 (1864).

⁷ *Stratton v. Allen*, 1 C. E. Green 233 (1863), applying this rule to a bond with warrant to confess judgment; *Commonwealth v. Pittsburgh*, 34 Penna. St. 496 (1859); *Clark v. Titcomb*, 42 Barb. 122 (1864); *McMasters v. Reed*, 1

§ 330. **Power of Corporation to Take and Transfer Bills.**—

A corporation may receive a bill of exchange for a debt due to it and may, by implication, transfer such bill.¹ And the power to transfer a bill or note may be inferred from the possession of the paper by the corporation.² It has also been held that the power to “sell and convey” all of its property implies power to indorse a bill of exchange belonging to the corporation.³ And an indorsement by a corporation may be a good transfer of the instrument, although it is *ultra vires* and therefore not binding as an indorsement upon the corporate indorser.⁴ So, it has been held that the trustees of an academy, authorized to procure subscriptions for its educational fund, may take a note for such subscription.⁵ And it has even been held that a foreign corporation, having no power to transact business in the State, may receive a note there for a subscription to its stock.⁶ And a corporation may transfer a note received by it for a stock subscription,⁷

Grant Cas. 36 (1854); Hays v. Galion G. L. Co., 29 Ohio St. 330 (1876); Barry v. Merchants' Exch. Co., 1 Sandf. Ch. 280 (1844); Mead v. Keeler, 24 Barb. 20 (1857); Beers v. Phoenix Glass Co., 14 Barb. 358 (1852); Atty. General v. Life, &c., Ins. Co., 9 Paige 470 (1842). This is true likewise of municipal corporations, Kelley v. Mayor, &c., *supra*; Bank of Chillicothe v. Chillicothe, *supra*.

¹ McIntire v. Preston, 10 Ill. 48 (1848); Frye v. Tucker, 24 Ib. 180 (1860); Planters' Bank v. Sharp, 6 How. 301 (1848); Hardy v. Merriwether, 14 Ind. 203 (1860); notwithstanding a prohibition against trading in notes, John v. Farmers' Bank, 2 Blackf. 367 (1830). So it may receive a note for a sale of land and dispose of it, notwithstanding a statutory prohibition against dealing in commercial paper, Buckley v. Briggs, 30 Mo. 452 (1860). Or it may take a note from its treasurer in settlement of a misapplication by him of its funds, German Congregation v. Stegner, 21 Ohio St. 488 (1871). And if authorized to take notes which “may be used for the payment of loss and liabilities and for any other purpose connected with the business of the Co.,” it may transfer such note as security for its debts, Great Western Ins. Co. v. Thayer, 4 Lans. 459 (1871).

² Brown v. Donnell, 49 Me. 421 (1860); Nelson v. Eaton, 26 N. Y. 410 (1863). And the transfer may be made by an agent without the use of the corporate seal, Garrison v. Combs, 7 J. J. Marsh. 84 (1831).

³ Savage v. Walshe, 26 Ala. 631 (1855).

⁴ Smith v. Johnson, 3 Hurlst. & N. 222 (1858); Brown v. Donnell, 49 Me. 421 (1860).

⁵ Trustees of Amherst Academy v. Cows, 6 Pick. 427 (1828).

⁶ Bartlett v. Chouteau Ins. Co., 18 Kans. 369 (1877). Such note is not therefore void, but the corporation cannot sue on it without first complying with the State laws, American Ins. Co. v. Wellman, 69 Ind. 413 (1879).

⁷ Clark v. Farrington, 11 Wis. 321 (1860); Cornell v. Hichens, *Ib.* 368; Blunt v. Walker, *Ib.* 349. And this will be valid, although the stock may never have been delivered, Clark v. Farrington, *supra*.

or for insurance made by it.¹ An express statutory authority should, however, be strictly construed. Thus, if a corporation is authorized by statute to receive notes for insurance premiums, "payable *within* twelve months from date," this, it is held, will not authorize the taking of a note payable twelve months from date.²

§ 331. A bank which has discounted and owns a note may transfer it, even though it has been dishonored;³ and although a subsequent statute prohibits such transfer.⁴ And by Massachusetts statute a corporation may transfer a note within three years after the expiration of its charter, the corporate existence being continued for the purpose of settling its affairs.⁵

By the National Banking Act, however, no authority is given to national banks to use their fund in purchasing notes, and it seems that a national bank cannot acquire title to such paper by purchase other than in the usual form of discount.⁶ But where a national bank has purchased a note and brings suit upon it, it has been held that even a prior indorser cannot question the capacity and title of the bank.⁷ So, one who gives his note to a company cannot question the organization of the company as a matter of defense.⁸ And the maker of such a note, which has been transferred to a *bona fide* holder for value, is estopped from denying the existence of the corporation.⁹ So, the maker of a note to a foreign cor-

¹ Brookman v. Metcalf, 32 N. Y. 591 (1865); Farmers' Bank v. Maxwell, 16. 579.

² Osgood v. Toplitz, 3 Laus. 184 (1870); but the defect may be cured by a valid renewal, Osgood v. Toole, 1 Hun 167 (1874).

³ Marvin v. Hymers, 12 N. Y. 223 (1855).

⁴ Planters Bank v. Sharp, 6 How. 301 (1848).

⁵ Folger v. Chase, 18 Pick. 63 (1836).

⁶ Lazear v. National Union Bank, 52 Md. 78 (1879); First Nat. Bank v. Pierson, 24 Minn. 140 (1877). So, under the Minnesota banking act, a power to discount is a power not to buy but to make loans on such securities at lawful discount, Farmers', &c., Bank v. Baldwin, 23 Minn. 198 (1876).

⁷ National Pemberton Bank v. Porter, 125 Mass. 333 (1878).

⁸ Studebaker, &c., Mfg. Co. v. Montgomery, 74 Mo. 101 (1881); especially if given in payment of a stock subscription, Goodrich v. Reynolds, 31 Ill. 490 (1863).

⁹ Camp v. Byrne, 41 Mo. 525 (1867); Nashua F. I. Co. v. Moore, 55 N. H. 48 (1874).

poration cannot avail himself of the defense that it had no power to transact business in the State where the note was given.¹ And where one has given an accommodation note to a corporation, and it has been afterwards renewed and transferred to a *bona fide* holder for value, the maker is liable upon it at suit of such holder.²

§ 332. **Banking Powers.**—It is to be observed that banking powers are not in general incident to the business of a corporation, but must be expressly conferred. Nor can such powers be inferred from an express general authority to “hold, sell, grant, and dispose of” real or personal estate “by mortgage, or in such other manner as they shall deem most proper for the best interests of the corporation;”³ nor from an authority “to buy and sell drafts and bills of exchange.”⁴ And in New York certificates of deposit bearing interest and redeemable after thirty years fall within the prohibition of the statute as to banking powers.⁵ So, post notes by New York banking associations, and securities transferred as collateral for their payment, are void.⁶ But certificates of deposit not used nor intended to circulate as money do not seem to be within the prohibition of the statute.⁷ On the other hand, the business of discounting notes, prohibited by the New York Revised Statutes, is not conferred upon a Trust Company by a charter authorizing it “to buy or receive all kinds of property, to hold the same in trust * * * to receive merchandise upon storage and deposit, and to advance money upon property real or personal.”⁸ Nor has a savings

¹Shook v. Singer S. M. Co., 61 Ind. 520 (1878).

²Lucas v. Pitney, 3 Dutch. 221 (1858).

³State of Ohio v. Granville Alexandrian Society, 11 Ohio 1 (1841); State of Ohio v. Washington Social Library Co., 11 Ohio 96 (1841). But taking a note from the corporation treasurer in settlement of his misapplication of its funds is not within the prohibition of the Banking Act, German Congregation v. Stegner, 21 Ohio St. 488 (1871).

⁴In re Ohio Life Ins., &c., Co., 9 Ohio 291 (1839).

⁵New York Life Ins., &c., Co. v. Beebe, 7 N. Y. 364 (1852).

⁶Tylee v. Yates, 3 Barb. 222 (1848).

⁷Tracy v. Talmage, 18 Barb. 456 (1854).

⁸New York, &c., Trust Co. v. Helmer, 77 N. Y. 64 (1879), affirming 12 Hun 35.

bank power to discount commercial paper under the New York Revised Statutes.¹ But the statute prohibiting the issue of circulating medium for money does not include non-negotiable notes and drafts, which are not within the mischief guarded against by the statute.²

The statutory prohibition of banking powers includes the power of discounting notes or of taking a note for a loan and deducting the interest in advance.³ It has been held, however, that a savings bank charter authorizing investments in public stocks and "other security" includes in its authority loans on commercial paper.⁴ The statutory prohibitions as to banking powers do not extend to foreign corporations acting in their own State. Thus, a New Jersey corporation purchasing in that State a New York note at a usurious rate of discount may recover on it in New York.⁵

In England all corporations except the Bank of England were prohibited by the statute of George III. from making bills or notes payable on demand or within six months from date, as were also all partnerships of more than six persons.⁶ But it has since been enacted that corporations and partnerships of more than six members, doing business more than sixty-five miles from London, may issue bills or notes payable on demand. And if for more than £50, they may be payable in London or elsewhere at any period after date or sight. And such corporations and partnerships may also discount bills of exchange not drawn on themselves.⁷ And by the statute of William IV., which is still in force, corporations and partnerships of more than six members may now do

¹ *Pratt v. Short*, 79 N. Y. 437 (1880); *Pratt v. Eaton*, *Ib.* 449 (1880); 1 R. S. 712 §§ 3, 6.

² *Ontario Bank v. Schermerhorn*, 10 Paige 109 (1843).

³ *Philadelphia Loan Co. v. Towner*, 13 Conn. 249 (1839).

⁴ *Duncan v. Md. Savings Institution*, 10 Gill & J. 299 (1838).

⁵ *Hackettstown Bank v. Rea*, 6 Lans. 455 (1872).

⁶ 39 and 40 Geo. III. c. 28 § 15. And see *Bank of England v. Anderson*, 3 Bing. N. C. 589; 4 Scott 50; 2 Keen 328 (1836). But this act does not apply to commercial firms of more than six partners, *Wigan v. Fowler*, 1 Stark. 459.

⁷ 7 Geo. IV. c. 46. And as to the amount limited, see 3 and 4 Will. IV. c. 83 § 2; 7 and 8 Vict. c. 32 § 26.

business as bankers in London, but may not issue bills or notes payable in less than six months from their date.¹ It does not, however, follow that a corporation's bill or note, though prohibited by the English Banking Act, is therefore void. Such instrument is valid and binding on the corporation in the hands of a *bona fide* holder for value before maturity.²

§ 333. **Loans by Corporations.**—A corporation has in general no power to loan its funds and receive bills of exchange or other commercial paper for payment.³ But where it is authorized by charter to advance money on goods, it may accept a bill of exchange drawn against a consignment to be made.⁴ Where a corporation is authorized to receive notes in the course of its business, but forbidden to exercise any banking power, a note transferred to it will be presumed to have been taken lawfully in the course of business.⁵ And one who borrows money from a corporation cannot in his own defense question its power to lend.⁶ Nor can one who

¹3 and 4 Will. IV. c. 98 § 3.

²Broughton v. Manchester Water Works Co., 3 B. & Ald. 1; Wigan v. Fowler, 1 Stark. 459; Pickaway Co. Bank v. Prather, 12 Ohio St. 497 (1861). "If there was an utter want of power in the corporation to make such a contract as the agreement upon its face purports to be, it is of no validity either in the hands of the corporation or of its assignee; the bank knew, and the assignee must be presumed to know, the law, and as it appears upon the face of the contract that it is not warranted by the charter, the assignee cannot be presumed to have taken it in good faith and without notice of its invalidity. But if a negotiable security given to or made by a corporation appears upon its face to be such as the corporation might make or receive under its charter, and the assignee receives it before due and without notice, actual or constructive, of its real invalidity, it is an available security in his hands," Peck, J., in Pickaway Co. Bank v. Prather, *supra*, p. 512.

³Waddill v. Ala., &c., R. R. Co., 35 Ala. 323 (1859); Grand Lodge v. Waddill, 36 *Ib.* 319 (1860). So, in New York, of a savings bank, Pratt v. Eaton, 79 N. Y. 449 (1880). But the corporation may in such case recover the money loaned in an action for moneys had and received. Waddill v. Ala., &c., R. R. Co., *supra*. But see, *contra*, Grand Lodge v. Waddill, *supra*, where the former case is distinguished incorrectly as turning on the officers' want of authority to bind the corporation.

⁴Munn v. Commission Co., 15 Johns. 44 (1818).

⁵Hart v. Missouri, &c., Ins. Co., 21 Mo. 91 (1855).

⁶1 Daniel 362, 397; Green's Brice's Ultra Vires 619 n., 375 n.; Poock v. Lafayette Building Assoc., 71 Ind. 357 (1880); State Board v. Citizens', &c., Ry. Co., 47 *Ib.* 407; Farmington Sav. Bank v. Fall, 71 Me. 49 (1880); Massy v. Building Association, 22 Kans. 624 (1879). This is so, too, in case of a trust deed securing a loan on note in violation of the National Bank Act, National Bank v. Matthews, 8 Otto 621 (1878).

makes a note to a corporation at suit of the indorsee question its power to indorse.¹

§ 334. **Accommodation Paper.**—Giving accommodation paper is never incident to the business of a corporation and is therefore *ultra vires* and unlawful.² And such paper cannot afterward be ratified by the corporation.³ So, a national bank cannot become an accommodation indorser.⁴ Nor can a corporation without express power guarantee the debt of another.⁵ Where, however, a railroad company transfers property with a guaranty and receives the proceeds, it has been held to be estopped from defense on the ground of its want of power.⁶ So, it has been held that in transferring township bonds given to a railroad company to aid in its construction the company may guarantee the bonds.⁷ In such cases, however, the guaranty is an original contract of the corporation for its own benefit, the consideration moving to itself and not to the person whose debt is guaranteed.

A corporation may exceed its powers in general, or in some special instance only, and the term *ultra vires* is not properly applicable to a corporation's abuse of the general power possessed by it.⁸ Thus, where a corporation may take notes in its business but exceeds its power by taking a note for a stock subscription, the note will be good in the hands

¹*Brown v. Donnell*, 49 Me. 421 (1860).

²1 Daniel 361; 1 Parsons 166; Green's Brice's *Ultra Vires* 252; *Bank of Genesee v. Patchin Bank*, 13 N. Y. 309 (1855); *Ætna Nat. Bank v. Charter Oak Ins. Co.*, 50 Conn. 167 (1882); *Morford v. Farmers' Bank of Saratoga Co.*, 26 Barb. 568 (1857); *Bridgeport City Bank v. Empire Stone Dressing Co.*, 30 Barb. 421 (1859). And such paper is void even in the hands of the indorsee, *Smead v. Indianapolis R. R.*, 11 Ind. 109 (1858).

³*Hall v. Auburn Turnpike Co.*, 27 Cal. 255 (1865); *Smead v. Indianapolis R. R.*, *supra*.

⁴*Nat. Bank of Gloversville v. Wells*, 79 N. Y. 498 (1880), *obiter*.

⁵*Madison Pl. Road Co. v. Watertown P. R. Co.*, 7 Wis. 59 (1859). But in *Madison, &c., R. R. v. Norwich Saving Soc.*, 24 Ind. 457 (1865), it was held that the sale and guaranty of the bond of another company was within the general powers of a corporation and that the fact that such power had been exercised by it for the accommodation of the other company could not be set up in defense against a *bona fide* holder for value.

⁶*Arnot v. Erie Ry. Co.*, 5 Hun 608 (1875); *Remsen v. Graves*, 41 N. Y. 471.

⁷*Railroad Co. v. Howard*, 19 Wall. 412 (1868).

⁸*Eastern Co. Ry. v. Hawkes*, 5 H. L. C. 331; *Bissell v. Mich. S. R. R.*, 22 N. Y. 289; *Monument Nat. Bank v. Globe Works*, 101 Mass. 57 (1869).

of a *bona fide* holder, upon the principle that otherwise the general power of taking and transferring notes abused in this case would leave a *bona fide* holder without means of information as to the abuse or protection against it.¹ If the act, therefore, is within the usual scope of the corporation's ordinary business and powers, it is not technically *ultra vires* and defensible at suit of such holder for value. So, an accommodation bill or note, although executed *ultra vires*, is good in the hands of a *bona fide* holder for value.² But if a bill or note is executed by a corporation in violation of an express statute, *e. g.* of the Banking Act, it is void even in the hands of a *bona fide* holder.³ If, on the other hand, a corporation has exceeded its powers in drawing a check, its payment to the rightful holder would still be good as between the bank paying and the corporation drawing it.⁴

§ 335. **Presumption of Validity.**—As has been said, where a corporation has power to take bills and notes in the course of its business but not for banking purposes, it will be presumed to have taken the paper sued upon lawfully until the contrary is made to appear.⁵ And in general where a corporation having a general power to make bills or notes executes such paper, it will be presumed to have been lawfully executed and will be good in the hands of a *bona fide* holder for value.⁶ So, where a foreign corporation executes a note,

¹ *Wilmarth v. Crawford*, 10 Wend. 341 (1833); *Marburg v. Lloyd*, 21 Kans. 545 (1879).

² *Bird v. Daggett*, 97 Mass. 494 (1867); *Monument Nat. Bank v. Globe Works*, 101 *Id.* 57 (1869).

³ *Root v. Godard*, 3 McLean 102 (1842); *Hayden v. Davis*, 3 McLean 276 (1843).

⁴ *Mahoney v. East Holyford Co.*, L. R. 7 H. L. 869 (1875).

⁵ *Hart v. Mo. State Mut., &c., Ins. Co.*, 21 Mo. 91 (1855).

⁶ 1 Daniel 361; 1 Edwards § 55; 1 Parsons 165; *Supervisors v. Schenck*, 5 Wall. 784 (1866); *Stoney v. American L. Ins. Co.*, 11 Paige 635 (1845); *Wilmarth v. Crawford*, 10 Wend. 343 (1833); *Nelson v. Eaton*, 26 N. Y. 410 (1863); *Oxford Iron Co. v. Spradley*, 46 Ala. 98 (1871); *McIntire v. Preston*, 10 Ill. 48 (1848). Thus, an overdraft on a bank account is presumptively an exercise of its express power of borrowing money and signing checks, *Mahoney Mining Co. v. Anglo-Californian Bank*, Am. L. Reg., Feb., 1882, p. 100, U. S. S. C. So, a promissory note is presumptively good execution of a power to "make contracts," *Mitchell v. Rome R. R.*, 17 Ga. 574 (1855). "If they can make a valid promissory note for any purpose, this note must be held good

it will be presumed to be valid in the State where it was made.¹ If, however, it appears on the face of the paper that the powers of the corporation have been exceeded, this would be notice of that fact to all holders.²

If the corporation has not properly exercised its power in making such paper, advantage may be taken of this by way of defense under the plea of general issue.³ So, if it has exceeded its power by making an accommodation note, this defense is admissible under a plea of general issue, and need not be pleaded specially.⁴

till some cause shall be shown why it is not so," Savage, C. J., in *Barker v. Mechanics' Ins. Co.*, 3 Wend. 97 (1829).

¹ *New York Floating Derrick Co. v. New Jersey Oil Co.*, 3 Duer 648 (1854).

² 1 Edwards § 55; 1 Parsons 166. See *Broughton v. Manchester Water Works Co.*, 3 B. & Ald. 9 (1819), Bayley, J., saying in this case: "Here, upon the face of the instrument, the acceptance appears to be by a corporation, and all corporations are prohibited from owing any money on a security of this description, unless it has more than six months to run. I think, * * * consequently, that this action cannot be supported."

³ Byles 71; *Hill v. Manchester, &c., Water Works Co.*, 5 B. & Ad. 866.

⁴ *Hall v. Auburn Turnpike Co.*, 27 Cal. 255 (1865).

II. MUNICIPAL CORPORATIONS.

- 336. Contracts—Seal—Negotiability.
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§ 336. **Contracts—Seal—Negotiability.**—Cities and other municipalities organized for purposes of local government have in many respects the powers and liabilities of private corporations. It is to be remembered, however, that they exist not for purposes of trade, but for objects of a political character only, and their powers are those which are incidental and necessary to the existence of such bodies.

It was formerly held, in England, that such bodies could only contract under their corporate seal.¹ As in the case of private corporations, however, it is now established in the United States at least that municipal corporations may bind themselves by simple contracts.²

And a municipal corporation may also give a negotiable instrument under seal. This character of negotiability belongs to bonds, with or without interest coupons, which are in form and intention negotiable.³ And, apart from the

¹Mayor, &c., of *Ludlow v. Charlton*, 6 M. & W. 815 (1840).

²*Fourth School District v. Wood*, 13 Mass. 199 (1816); *Union Bank v. Ridgely*, 1 Harr. & G. 413 (1827); *Mechanics Bank v. Bank of Columbia*, 5 Wheat. 326 (1820); *Legrand v. Hampden Sydney College*, 5 Munf. 324 (1817). So, as to unsealed coupons, *City of San Antonio v. Gould*, 34 Tex. 77 (1870). But a municipal corporation cannot give a guaranty of commercial paper, although it might have the power to receive or dispose of it, *Carter v. Dubuque*, 35 Iowa 416 (1872).

³*Green's Brice's Ultra Vires* 177*n.*; 1 *Dillon Mun. Corp.* § 405; 1 *Edwards* § 48; *Gelpeke v. City of Dubuque*, 1 Wall. 175 (1863); *Thomson v. Lee County*, 3 *Ib.* 327 (1865); *Commissioners of Marion Co. v. Clark*, 4 Otto 278 (1876); *Bank of Rome v. Rome*, 19 N. Y. 20 (1859); *Gould v. Town of Sterling*, 23 *Ib.* 464 (1861); *Marsh v. Little*, 1 Hun 554 (1874); S. C., 4 T. & C. 116; *Lindsley v. Diefendorf*, 43 How. Pr. 357 (1872); *Force v. City of Elizabeth*, 1 Stew. Eq. 406; *Boyd v. Kennedy*, 9 Vroom 146; *Society for*

question of authority to issue such bond, a *bona fide* holder of it for value before maturity is entitled to hold and recover upon it clear of defenses existing against the original holder.¹ Such bonds are to be regarded in the main as commercial paper, and holders of them are necessary parties to a suit in equity commenced by taxpayers to obtain an injunction against collection of taxes for their payment.²

§ 337. **Municipal Warrants.**—Orders, drafts and warrants which are drawn for payment of municipal debts by one public officer on another are not, however, negotiable and are only transferable subject to defenses originally existing against them.³ And the authority of the officer giving such warrant is always open to examination, into whatever hands the warrant may come.⁴ So, no purchaser can recover on such a warrant issued *ultra vires* and known by the original holder to have been so issued.⁵ If, however, the warrant be made expressly negotiable in form, it will be negotiable.⁶

Savings v. New London, 29 Conn. 174 (1860); *Town of Eagle v. Kolm*, 84 Ill. 292 (1876); *Craig v. City of Vicksburg*, 31 Miss. 216 (1856); *City of Aurora v. West*, 22 Ind. 88 (1864); *Board of Commissioners v. Bright*, 18 *Ib.* 93 (1862); *Durant v. Iowa County*, 1 Woolw. C. C. 72 (1864); *Arents v. Commonwealth*, 18 Gratt. 750 (1868); *Weith v. City of Wilmington*, 68 N. C. 24; *Belo v. Commrs. of Forsyth Co.*, 76 *Ib.* 489 (1877); *City of San Antonio v. Lane*, 32 Tex. 405 (1869); *Board v. T. & P. Ry. Co.*, 46 *Ib.* 316 (1876); *Dutchess Co. Ins. Co. v. Hachfield*, 1 Hun 675 (1874); *Society for Savings v. New London*, 29 Conn. 174 (1860); *Independent School District v. Hall*, 20 Cent. L. J. 112, 5 Sup. Ct. Rep. 371 (U. S. S. C. 1885). *Contra*, *Diamond v. Lawrence County*, 37 Penna. St. 353 (1860), as to which, see *Miller v. Race*, 1 Smith L. C. 819.

¹ *Grand Rapids, &c., R. R. Co. v. Sanders*, 17 Hun 552 (1879); *Cromwell v. County of Sac*, 6 Otto 51 (1877).

² *Board v. T. & P. R. W. Co.*, 46 Tex. 316 (1876).

³ 1 *Dillon Mun. Corp.* § 406; 1 *Daniel* 393; 1 *Edwards* § 51; *Mayor v. Ray*, 19 Wall. 478 (1873); *Steinbeck v. Liberty Township*, 22 Ohio St. 144 (1871); *Hyde v. County of Franklin*, 27 Vt. 185 (1855); *Smith v. Inhabitants of Cheshire*, 13 Gray 318 (1859); *Fox v. Shipman*, 19 Mich. 218 (1869); *Dana v. San Francisco*, 19 Cal. 486 (1861); *Emery v. Mariaville*, 56 Me. 315 (1868); *Sturtevant v. Liberty*, 46 *Ib.* 457 (1859); *East Union Township v. Ryan*, 86 Penna. St. 459 (1878); *Ohio v. Treasurer of Liberty Township*, 22 Ohio St. 144 (1871); *State v. Huff*, 63 Mo. 288 (1876); *School Directors v. Fogleman*, 76 Ill. 189 (1875); *Newell v. School Directors*, 68 *Ib.* 514 (1873); *Clark v. Des Moines*, 19 Iowa 199, 215 (1865); *School District v. Stough*, 4 Neb. 357 (1876).

⁴ *Taft v. Pittsford*, 28 Vt. 286 (1856).

⁵ *Salamanca Township v. Bank*, 22 Kans. 696 (1879).

⁶ 1 *Edwards* § 51; *Kelley v. Mayor, &c., of Brooklyn*, 4 Hill 265 (1843); *Crawford County v. Wilson*, 7 Ark. 214 (1846). And payment of such war-

And although such voucher may not be negotiable, it has been held that a payee who has given it to another as collateral and lost it by fraudulent diversion, cannot recover it in replevin from a *bona fide* holder without payment of the full amount paid by him for it.¹ Such an order is equivalent to a note or acceptance, and the corporation drawing it may be sued as maker or acceptor.²

§ 338. **Express Authority—When Necessary.**—A municipal corporation has, in general, no power to borrow money or give a bill or note for its payment without express statutory authority, and it cannot be held liable for such loan or on such paper, although the money obtained has been expended for municipal purposes.³ Nor can such corporation issue bonds without express authority in order to raise money for the payment of its lawful debts.⁴ The power in a municipal corporation to issue bills and notes must be expressly given,⁵ or clearly implied in the exercise of express powers.⁶

§ 339. **Implied Authority.**—Thus, the ordinary police powers given in a city charter will not authorize it to issue bonds for building a plank road, and such bonds will be void even in the hands of a *bona fide* holder.⁷ On the other hand, authority by charter “to establish and regulate markets” has been held to cover the purchase of a market site and the

warrant to the bearer is a good defense against the rightful owner, where it has been made in good faith, *Sweet v. County Commissioners*, 16 Minn. 107 (1871). And it has been held in Vermont that a holder of such warrant can sue on it in his own name, *Dalrymple v. Whittingham*, 26 Vt. 355 (1854). But see, *contra*, *Klein v. Supervisors*, 54 Miss. 254 (1877). And as regards negotiability to the extent of shutting out defenses to such warrants, see, also, *contra*, *Mayor v. Ray*, 19 Wall. 478 (1873).

¹*Talty v. Freedman's Trust Co.*, 1 MacArth. 522 (1874).

²*Steel v. Davis County*, 2 G. Greene 469 (1850).

³*Town of Hackettstown v. Swackhamer*, 8 Vroom 191 (1874).

⁴1 Edwards § 904.

⁵1 Daniel 393; *Dively v. City of Cedar Falls*, 21 Iowa 565 (1866); *Clark v. City of Des Moines*, 19 Ib. 199 (1865); *Mayor, &c., of Wetumpka v. Wetumpka Wharf Co.*, 63 Ala. 611 (1879); *Gause v. City of Clarksville*, 5 Dill. 165 (1879); *Wilson v. City of Shreveport*, 29 La. An. 673 (1877). And such bonds do not possess the qualities of negotiable paper, unless they are issued under such authority, *Hopper v. Town of Covington*, 8 Fed. Rep. 777 (1881).

⁶*Mayor of Nashville v. Ray*, 19 Wall. 468 (1873).

⁷*Chisholm v. City of Montgomery*, 2 Woods 584 (1875).

bonds given for it.¹ And in New Hampshire, where the selectmen of a town gave a promissory note for the enlistment of soldiers during the war, it was held that there was a presumption in favor of their authority to do so, until the contrary was shown.²

In the absence of express legislative authority municipal corporations have no power to contract debts or issue securities in aid of extraneous objects.³ Thus, they cannot issue bonds to aid in the construction of a railroad,⁴ or to pay for a subscription to its stock, not expressly authorized.⁵

But it is said that the power to contract a debt implies the power to borrow money for like purpose,⁶ and to make a bill of exchange or other commercial paper for its payment.⁷ And this latter proposition, as well as the former, has been applied to municipal corporations.⁸ This application is, however, condemned by Judge Daniel on the authority of Judge Dillon, although it seems to be supported by the cases decided.⁹

¹ *Ketchum v. City of Buffalo*, 14 N. Y. 356 (1856).

² *Shackford v. Newington*, 46 N. H. 415 (1866).

³ *Town of South Ottawa v. Perkins*, 4 Otto 262 (1876); *Pendleton County v. Amy*, 13 Wall. 297; *Kenicott v. Supervisors*, 16 *Ib.* 452; *St. Joseph Township v. Rogers*, *Ib.* 644; *Town of Coloma v. Eaves*, 2 Otto 484; *Hawkins v. Carroll County*, 50 Miss. 735 (1874).

⁴ *Sykes v. Mayor, &c., of Columbus*, 55 Miss. 115 (1877).

⁵ *Wells v. Supervisors*, 12 Otto 625 (1880); *Hancock v. Chicot County*, 32 Ark. 575 (1877).

⁶ *Mills v. Gleason*, 11 Wis. 470 (1860); *State v. Common Council of Madison*, 7 *Ib.* 688 (1858); *Lynde v. The County*, 16 Wall. 6 (1872).

⁷ 1 Daniel 356; 1 Edwards § 55; 1 Parsons 164; *Stratton v. Allen*, 1 C. E. Green 233 (1863); *Clark v. Titcomb*, 42 Barb. 122 (1864); *Meed v. Keeler*, 24 *Ib.* 20 (1857); *Beers v. Phoenix Glass Co.*, 14 *Ib.* 358 (1852); *Att'y Gen. v. Life Ins. Co.*, 9 Paige 470 (1840); *Barry v. Merchants' Exch. Co.*, 1 Sandf. Ch. 280 (1844); *McMasters v. Reed*, 1 Grant Cas. 36 (1854); *Hays v. Galion Gas Light Co.*, 29 Ohio St. 330 (1876); *Catron v. First Univ. Soc.*, 46 Iowa 168 (1877); *Pittman v. Kintner*, 5 Blackf. 253 (1839); *Hamilton v. Newcastle, &c., R. R.*, 9 Ind. 359 (1857); *Moss v. Oakley*, 2 Hill 265 (1842); *Safford v. Wyckoff*, 4 *Ib.* 442 (1842).

⁸ *Commonwealth v. Pittsburgh*, 34 Penna. St. 496 (1859); *Kelley v. Mayor, &c.*, 4 Hill 263 (1843); *Bank of Chillicothe v. Chillicothe*, 7 Ohio 359 (1836). So, *a fortiori*, the power to borrow money to pay a debt implies the power to issue a negotiable bond for it, *Merrill v. Town of Monticello*, 22 Fed. Rep. 589 (U. S. C. C. Ind. 1884).

⁹ 1 Daniel 394; 1 Edwards § 48; *Dillon on Mun. Bonds* § 6. But see *City of Williamsport v. Commonwealth*, 84 Penna. St. 487 (1877), *Agnew, Woodward and Sterrett, JJ., dissenting*.

An incorporated school district having express power to borrow money for the erection of a school building, has authority as a necessary incident to secure its payment by a promissory note.¹ Or it may give such note for a loan obtained and used for the purpose of paying a debt incurred for such building.² So, it has been held that a city may give its *negotiable* bonds under an authority given by its charter to issue bonds to a railroad company in aid of construction.³ And where power to borrow money is expressly given, it is said to carry with it incidentally the power to issue bonds or other evidences of debt.⁴ So, if a city can lawfully create a debt for paving and grading streets, it may, without express authority, issue bonds for the same object.⁵ In like manner, it may lease rooms for the use of the common council and give its note in payment of the rent.⁶ But county commissioners authorized by statute to provide for the erection of public buildings cannot issue negotiable bonds for that purpose without further authority.⁷

§ 340. **Negotiable Distinguished from Non-negotiable Instruments.**—A distinction has been made between the power to issue negotiable and non-negotiable evidences of debt as incidental to the power of contracting debt or borrowing money. And it has been held that for the issue of a negotiable bond or note, which will be unassailable in the hands

¹Montague v. Church School District, 5 Vroom 218 (1870). But in New Hampshire school districts had no authority to borrow money on their note for such purpose prior to the Act of 1855, Weare v. School District, 44 N. H. 189 (1862). And where the school district has authority to contract the debt for which its note is given, the burden of proving this lies on the holder of the note, School District v. Thompson, 5 Minn. 280 (1861).

²Clarke v. School District, 3 R. I. 199 (1855); Baker v. Chamblès, 4 G. Greene 428 (1854); Sheffield School Township v. Address, 56 Ind. 157 (1877).

³City of Vicksburg v. Lombard, 51 Miss. 111 (1875). And the validity of such a bond is not affected by the fact of the interest being made payable at a place outside of the State, *Ib.* So, too, as to the power to make such bond negotiable in form, Andover v. Grafton, 7 N. H. 294 (1834). But see *contra*, Knapp v. Mayor, &c., of Hoboken, 10 Vroom 394 (1877).

⁴State of Ohio v. Trustees of Goshen Township, 14 Ohio St. 569 (1863).

⁵City of Williamsport v. Commonwealth, 84 Penna. St. 487 (1877).

⁶Douglas v. Mayor, &c., of Virginia City, 5 Nev. 147 (1869).

⁷Claiborne County v. Brooks, 111 U. S. 400 (1883). But see, *contra*, Clarke Company v. Board of Supervisors of Culver County, 6 Minn. 204 (1861).

of a *bona fide* holder for value before maturity, authority must be either expressly given or clearly implied.¹ And a distinction has been made in favor of a prohibition of all interest-bearing obligations made without express authority by the agent of a municipal corporation.² Neither can a city issue bills or notes intended to circulate as money without express authority;³ especially where such issue is prohibited generally by statute to all persons and corporations.⁴

It may now be regarded as the established rule that a municipal corporation may issue bonds without express authority for a debt lawfully contracted in the performance of its municipal duties.⁵ Thus, it may give its bonds, as has been said, for the purchase of a site for a market, such purchase being authorized by a general power in its charter as to markets.⁶ And where, in the execution of powers expressly conferred, it becomes necessary to borrow money, this may be done by means of its commercial paper, but mere administration and taxing powers will not be sufficient.⁷ An authority to purchase, build and take stock in internal improvements implies authority to give a negotiable bond in payment.⁸

§ 341. **Statutory Requirements.**—If, however, the statute prescribes a particular course for the effecting of a particular

¹ *Knapp v. Mayor, &c., of Hoboken*, 10 Vroom 394 (1877). And see *Town of Hackettstown v. Swackhamer*, 8 *Ib.* 198 (1874); *Mayor v. Ray*, 19 Wall. 478 (1873). But in New Hampshire the rule seems to be different, *Andover v. Grafton*, 7 N. H. 294 (1834); and in Mississippi, *City of Vicksburg v. Lombard*, 51 Miss. 111 (1875).

² *County of Hardin v. McFarlin*, 82 Ill. 138 (1876).

³ *Lindsey v. Rottaken*, 32 Ark. 619 (1878); Ark. R. S. cc. 24, 119.

⁴ *Thomas v. City of Richmond*, 12 Wall. 349 (1870); Va. Code 1860.

⁵ *Lynde v. The County*, 16 Wall. 6 (1872); *Commonwealth, ex rel. Whelen, v. City of Pittsburgh*, 88 Penna. St. 66 (1878); *De Voss v. City of Richmond*, 18 Gratt. 338 (1868); *City of Galena v. Corwith*, 48 Ill. 423 (1868).

⁶ *Ketchum v. City of Buffalo*, 14 N. Y. 363 (1856).

⁷ 1 Daniel 394; 1 Edwards § 48.

⁸ 1 Edwards § 917; *Commonwealth, ex rel. Hamilton, v. City of Pittsburgh*, 34 Penna. St. 496 (1859); *Commonwealth, ex rel. Middleton, v. Allegheny County*, 37 *Ib.* 237 (1860); *Commonwealth, ex rel. Reinboth, v. Councils of Pittsburgh*, 41 *Ib.* 278 (1861); *Curtis v. County of Butler*, 24 How. 435 (1860); *Bushnell v. Beloit*, 10 Wis. 195 (1860); *Seybert v. City of Pittsburg*, 1 Wall. 292 (1863).

purpose, no other can be lawfully pursued.¹ Thus, if a city comptroller's warrant has a particular form prescribed by charter, that form is necessary to its validity.² So, if authority is given to borrow and issue a note for payment, a bond for that purpose is unauthorized.³ Or if the power is to issue "county orders," a bill or note will not be included.⁴ Or if the statute authorizes a ten-year bond, a bond for twenty years will not be valid;⁵ although such authority has been held sufficient for a bond payable in *less* than the authorized time.⁶

Provision in a railroad charter that "it shall be lawful for the agent of any corporate body to subscribe, &c.," gives no authority to a municipal corporation to subscribe for stock and issue its bonds in payment.⁷ But a statute authorizing a town to "borrow money for any public purpose," will enable it to borrow money in aid of a railroad company and issue its bonds for that purpose.⁸

A power to pay by "certificates of loan" is equivalent to a power to give coupon bonds.⁹ So, engraved bonds may be issued under an authority for printed bonds.¹⁰

§ 342. **Popular Consent Required.**—Municipal corporations are often prohibited by the legislature from issuing bonds for railroad aid or other like purposes without consent of the taxpayers first obtained. This prohibition does not amount to an authority to make such bonds on obtaining such consent, and, without express legislative power, a mere vote of the people gives no such authority.¹¹ Such statutes must be

¹County of Hardin v. McFarlin, 82 Ill. 138 (1876).

²Lucas v. City of San Francisco, 7 Cal. 463 (1857).

³Mayor, &c., of Little Rock v. State Bank, 8 Ark. 227 (1847).

⁴Goodnow v. Commissioners of Ramsey County, 11 Minn. 31 (1865).

⁵Woodruff v. Town of Okolona, 57 Miss. 806 (1880).

⁶Gilchrist v. Little Rock, 1 Dill. 261 (1871).

⁷Township of East Oakland v. Skinner, 4 Otto 255 (1876).

⁸Rogers v. City of Burlington, 3 Wall. 654 (1865).

⁹Amey v. Mayor, &c., of Allegheny City, 24 How. 364 (1860).

¹⁰And a county cannot repudiate such bonds after recognizing them by paying the interest, McKee v. Vernon County, 3 Dill. 210 (1874).

¹¹Allen v. Louisiana, 13 Otto 80 (1880); People v. Wayneville, 83 Ill. 469 (1878).

strictly construed. Thus, a statutory provision that a municipal corporation "may" obtain such consent is a requirement that it *shall* do so.¹ If the statute provide that a "strip" of the county through which a railroad may pass, may vote to take stock and tax themselves for such road, this will not authorize the *county* to create a debt and issue its bonds therefor.²

And where such act of the legislature falls under a constitutional prohibition, as in the State of Missouri, bonds issued by a town for the purchase of land donated by it to a railroad company are within the prohibition and void.³ Such constitutional prohibition will not, however, apply to bonds subsequently issued under an earlier act.⁴ And it has been held not to reach the case of a branch road built, and bond issued therefor, under the authority of a charter granted previous to the adoption of the constitutional provision.⁵ But it will reach subsequent amendments of such earlier statutes;⁶ as well as all subsequently issued bonds, where there is no question of an existing vested right.⁷ And where the constitution prohibits a county subscribing for railroad stock or loaning its credit to such enterprises, a subscription actually made after the adoption of such provision is unconstitutional and void, although made under the authority of an earlier enabling act.⁸ In like manner, a statute relating to existing county warrants and requiring them to be publicly registered before a certain future day and barring all claim

¹ Edwards § 907; Leavenworth, &c., R. R. Co. v. County Ct. of Platte Co., 42 Mo. 171 (1868); Steins v. Franklin County, 48 Mo. 167 (1871).

²Ogden v. County of Daviess, 12 Otto 634 (1880).

Jarrott v. Moberly, 13 Otto 580 (1880); Const. Mo. 1865 Art. 11 § 14.

³County of Callaway v. Foster, 3 Otto 567 (1876); County of Scotland v. Thomas, 4 *Ib.* 688 (1876); County of Henry v. Nicolay, 5 *Ib.* 619 (1877); Cass v. Dillon, 2 Ohio St. 607 (1853); State of Ohio, *ex rel.* Smead, v. Trustees of Union Township, 8 *Ib.* 394 (1858); Commissioners of Knox Co. v. Nichols, 14 *Ib.* 260 (1863); State of Mo., *ex rel.* St. Joseph, &c., R. R. Co., v. County Ct. of Sullivan Co., 51 Mo. 522 (1873); State of Minn., *ex rel.* Cen. R. R. of Minn., v. Town of Clark, 23 Minn. 422 (1877).

⁴County of Henry v. Nicolay, 5 Otto 619 (1877).

⁵Dodge v. County of Platte, 82 N. Y. 218 (1880), reversing 16 Hun 285.

⁷Falconer v. Buffalo, &c., R. R. Co., 69 N. Y. 491 (1877).

⁸Aspinwall v. Commissioners of the County of Daviess, 22 How. 364 (1859).

thereafter under them, if not so registered, is constitutional and valid.¹

§ 343. **Defenses—Unlawful Issue.**—It may be laid down as a general principle that debts unlawfully contracted by a municipal corporation are not binding upon it.² Thus, county warrants issued without legal authority, or not in the form prescribed by law, are not binding upon the county.³ So, a municipal bond issued without authority is invalid, although it may be negotiable in form.⁴

And the defense of original want of authority to issue the bond is available against all holders.⁵ The fact that the holder is a purchaser in good faith and for value before the maturity of the bond does not preclude the town from making such defense, unless the acts of its officers or agents are by statute made conclusive upon it.⁶ Thus, the holder of a draft issued by a town in excess of its powers, although purchasing it in good faith, takes it with notice of the town charter and all limitations and powers contained in it.⁷

It has been held, however, that where the legislative authority is to be exercised on certain conditions and these are not recited in the bond, the town cannot avail itself of a failure to comply with them as a defense against a *bona fide* holder for value.⁸ But if the statute provide that before any municipal bond shall be valid as a negotiable security, it shall be registered and the certificate of such registry be indorsed on it, the bonds without such indorsement are void in the hands of any holder.⁹ Indeed, if there is no authority

¹ *Watson v. Doherty*, 56 Miss. 628 (1879).

² *Bradley v. Ballard*, 55 Ill. 413 (1870).

³ *Supervisors v. Arrighi*, 54 Miss. 668 (1877); *Commissioners of Leavenworth v. Keller*, 6 Kans. 510 (1870).

⁴ *Hancock v. Chicot Co.*, 32 Ark. 575 (1877).

⁵ *Chisholm v. City of Montgomery*, 2 Woods 584 (1875); *Hancock v. Chicot County*, 32 Ark. 575 (1877); *Lindsey v. Rottaken*, *Ib.* 619 (1878).

⁶ *Cagwin v. Town of Hancock*, 84 N. Y. 532 (1881), reversing 22 Hun 201.

⁷ *Halstead v. Mayor, &c.*, New York, 5 Barb. 218 (1849); affirmed, 3 N. Y. 430 (1850).

⁸ *American Life Ins. Co. v. Town of Bruce*, U. S. S. C. April 1882, 4 Morr. Trans. 664; *Wood v. Allegheny County*, 3 Wall. Jr. 267 (1859); *Danielly v. Cabaniss*, 52 Ga. 211 (1874).

⁹ *Anthony v. County of Jasper*, 11 Otto 693 (1879); S. C., 4 Dill. 136 (1876).

to a town to issue its bond or commercial paper, there can be no *bona fide* holder of it in the commercial sense of the term.¹

One who purchases such bond in good faith is not bound to look any farther than to see that there is legislative authority for its issue, and that, so far as appears by official certificates, all conditions precedent to its issue have been performed.² He is chargeable with knowledge of the law authorizing the issue of the bond,³ especially if this appears on the face of the instrument;⁴ and also with knowledge of the construction given to such statute by the courts.⁵ He is also chargeable with knowledge of all public records affecting the authority to issue the bond.⁶ So, where the authority to issue bonds in aid of a railroad, is given to counties through which the road runs, the holder of a bond issued under such authority is chargeable with knowledge of the location of the road and that it did not run through the county giving the bond.⁷ But he is not chargeable with knowledge of the fact that a suit is pending to restrain the issue of such bonds.⁸ "A party will not be charged with

¹Township of East Oakland v. Skinner, 4 Otto 255 (1876); Marsh v. Fulton County, 10 Wall. 676 (1870); School Directors v. Fogleman, 76 Ill. 189 (1875); Cecil v. Board of Liquidation, 30 La. An. 34 (1878).

²Bond debt cases, 12 So. Car. 200 (1879); Block v. Commissioners, 9 Otto 686 (1878); Mercer County v. Hackett, 1 Wall. 83 (1863); St. Joseph Township v. Rogers, 16 Ib. 644 (1872); S. C. & St. P. R. Co. v. County of Osceola, 45 Iowa 168 (1876); Grand Chute v. Winegar, 15 Wall. 355 (1872); Meyer v. City of Muscatine, 1 Ib. 384 (1863); Gelpcke v. City of Dubuque, Ib. 175 (1863).

³Town of South Ottawa v. Perkins, 4 Otto 260 (1876); County of Bates v. Winters, 7 Ib. 83 (1877); Ogden v. County of Daviess, 12 Ib. 634 (1880); Williamson v. City of Keokuk, 44 Iowa 88 (1876); State, *ex rel.* Watkins, v. Macon County Ct., 68 Mo. 29 (1878).

⁴McClure v. Township of Oxford, 4 Otto 429 (1876); Commonwealth v. Chesapeake, &c., Canal, 32 Md. 501 (1870); Fisk v. City of Kenosha, 26 Wis. 23 (1870); Town of Middleport v. Ætna Life Ins. Co., 82 Ill. 562 (1876); Silliman v. Fredericksburg, &c., R. R. Co., 27 Gratt. 119 (1876); Louisiana State Bank v. Orleans Nav. Co., 3 La. An. 294 (1843); Slifer v. Howell, 9 W. Va. 391 (1876).

⁵Commonwealth v. Chesapeake Canal, 32 Md. 501 (1870).

⁶Starin v. Town of Genoa, 23 N. Y. 439 (1861); Gould v. Town of Sterling, Ib. 456 (1861); Bissell v. City of Kankakee, 64 Ill. 249 (1872); Veeder v. Town of Lima, 19 Wis. 280 (1865); Clark v. City of Des Moines, 19 Iowa 199 (1865). See, too, Backman v. Charlestown, 42 N. H. 125 (1860).

⁷State of Ohio v. Commissioners of Hancock Co., 11 Ohio St. 183 (1860).

⁸Bailey v. Town of Lansing, 13 Blatch. 424 (1876); Durant v. Iowa County, 1 Woolw. 69 (1864); County of Macon v. Shores, 7 Otto 272 (1877); County of Cass v. Gillett, 10 Ib. 585 (1879); County of Warren v. Marey, 7 Ib. 96 (1877).

constructive notice unless the circumstances are such that the court can say that it was his duty to acquire the knowledge in question, and that his failure to obtain it was the result of culpable negligence. It is not enough that he should, from want of prudent caution, have neglected to make inquiries, but he must have designedly abstained from such inquiries for the purpose of avoiding knowledge. There must be a willful blindness and not mere want of caution."¹

§ 344. **Irregular Execution.**—If the defense is merely one of irregularity in the manner of executing the instrument, the corporation may be estopped from setting up such defense against a holder in good faith and for value.² This is so where the facts in question have been already determined by the common council and the bonds have been issued and delivered in exchange for railroad stock and have come into the hands of a *bona fide* holder.³ So, where the subscription to stock was authorized to be made to one railroad company, but the railroad was transferred and the subscription made and bonds issued to another company, with the consent of the county, which afterward paid interest on the bonds for several years.⁴ Where a statute authorizes the issue of bonds in aid of a railroad company, provided that the ordinance for their issue specifying the time, terms and conditions of the bonds to be issued shall first be submitted to a popular vote, the city council cannot afterward alter the time, terms or conditions prescribed in the ordinance submitted.⁵ But it will be presumed in favor of a *bona fide* holder that the bonds

¹Joynes, J., in *De Voss v. City of Richmond*, 18 Gratt. 338 (1868). In this case the bonds in question were issued by the city of Richmond for other bonds that had been confiscated by the Confederate Government, without notice to the holders, and the city was held liable on the new bonds to a *bona fide* holder for value.

²*Steines v. Franklin County*, 48 Mo. 167 (1871); *Barrett v. County Ct. of Schuyler Co.*, 44 *Ib.* 197 (1869); *Hannibal, &c., R. R. Co. v. Marion Co.*, 36 *Ib.* 294 (1865); *State of Ohio v. Trustees of Goshen Township*, 14 Ohio St. 569 (1863); *Rogers v. Burlington*, 3 Wall. 654 (1865).

³*Bissell v. City of Jeffersonville*, 24 How. 299 (1860).

⁴*County of Ray v. Vansycle*, 6 Otto 675 (1877).

⁵*Hodgman v. Chicago, &c., R. R. Co.*, 20 Minn. 48 (1873).

have been issued under the circumstances prescribed by the enabling statute.¹

§ 345. **Estoppel by Recitals.**—As to all matters except the legislative authority for their issue, the holder may rely on the recitals contained in the bonds.² And such recital in the bond will be available by way of estoppel in favor of the *bona fide* holder of a coupon.³

So, the official certificate on a bond as to the circumstances authorizing its issue constitutes an estoppel in favor of a holder for value without notice.⁴ So, where a county, giving its bonds for a subscription to the stock of a railroad company, consents to an extension of the time limited for the completion of the road, and its officers within such extended period declare the road completed to their satisfaction and deliver the bonds and receive the stock, the county cannot afterward set up in defense to the bonds that the road was not completed within the time specified.⁵ And even where the consent of the taxpayers is required, the recital of such consent in the bonds will estop the corporation from denying it.⁶

Where there is a constitutional limit to the indebtedness of cities, an act authorizing the issue of bonds without any such limitation is void, and so are bonds issued under it and disclosing on their face the purpose of their issue.⁷ And a mere recital of the statutory authority will constitute no es-

¹ *Gelpcke v. City of Dubuque*, 1 Wall. 175 (1863).

² *Dodge v. County of Platte*, 16 Hun 285 (1878); *Smith v. County of Clark*, 54 Mo. 58 (1873); *Moran v. Commissioners of Miami Co.*, 2 Black. 722 (1862).

³ *Commissioners of Knox Co. v. Aspinwall*, 21 How. 539 (1858).

⁴ *Edwards* §§ 876, 893; *Menasha v. Hazard*, 12 Otto 81 (1880); *County of Moultrie v. Rockingham Ten-Cent Savings Bank*, 2 *Ib.* 631 (1875); *Orleans v. Platt*, 9 *Ib.* 676 (1878); *Harter v. Kernochan*, 13 *Ib.* 562 (1880); *Kenicott v. Supervisors*, 16 Wall. 452 (1872); *Town of Coloma v. Eaves*, 2 Otto 484 (1875); *Marcy v. Township of Oswego*, *Ib.* 637 (1875).

⁵ *County of Randolph v. Post*, 3 Otto 502 (1876).

⁶ *Scipio v. Wright*, 11 Otto 665 (1879); *First National Bank of North Bennington v. Town of Dorset*, 16 Blatch. 62 (1879); *Town of Springport v. Teutonia Savings Bank*, 84 N. Y. 403 (1881), 75 *Ib.* 397 (1878); *Bond Debt Cases*, 12 So. Car. 200 (1879); *Commissioners of Douglass Co. v. Bolles*, 4 Otto 104 (1876); *Town of Coloma v. Eaves*, 2 *Ib.* 484 (1875).

⁷ *Fisk v. City of Kenosha*, 26 Wis. 23 (1870).

toppel, where the bonds have been issued in disregard of the constitutional provision.¹

But the recital, that the conditions precedent to the issue of bonds have been performed, will constitute an estoppel in favor of the holder.² And a misrecital of the statute authorizing the issue will not amount to a matter of defense.³

§ 346. **Estoppel by Corporate Acts.**—If the bond has been ante-dated in order to evade a law requiring such bonds to be registered, and the corporation has received the proceeds of the bond, it will be liable to the holder for the amount received.⁴ And, in general, receiving the proceeds of the bonds will amount to a waiver of irregularities in their issue.⁵ And so will the levy of a tax for them and payment of interest on them for a term of years;⁶ or receiving railroad stock for the bonds and paying interest on them.⁷ The town will not, however, be estopped from defending, on the ground of original want of authority, either by levying a tax for payment of the bonds or by paying interest on them.⁸

Where the election, prescribed as a means of obtaining the consent of taxpayers, has been ordered by the board of supervisors instead of the county court prescribed by the statute, and the bonds issued have been subsequently validated by statute and afterward under another statute exchanged for new bonds authorized by a popular vote, as prescribed by statute, the last vote will amount to a ratification curing all original

¹*Lippincott v. Town of Pana*, 92 Ill. 24 (1879); *Gaddis v. Richland County*, *Id.* 119 (1879); *People, ex rel. Cairo, &c., R. R. Co., v. Supervisors of Jackson County*, *Id.* 441 (1879).

²*Commissioners of Johnson Co. v. January*, 4 Otto 202 (1876); *Poore*, 24 Gratt. 200; *Dixon Company v. Field*, 111 U. S. 83; *Anderson County v. Beal*, 5 Sup. Ct. Rep. 433 (U. S. S. C. 1885).

³*Commissioners of Johnson Co. v. January*, 4 Otto 202 (1876).

⁴*Louisiana v. Wood*, 12 Otto 291 (1880); *Wood v. City of Louisiana*, 5 Dill. 122 (1878).

⁵*Pendleton County v. Amy*, 13 Wall. 297 (1871).

⁶*Supervisors v. Schenck*, 5 Wall. 784 (1866).

⁷*Commissioners of Johnson County v. January*, 4 Otto 202 (1876).

⁸*Weismer v. Village of Douglass*, 4 Hun 201 (1875), affirmed 64 N. Y. 91 (1876); *Marshall County v. Cook*, 38 Ill. 44 (1865). And to the same effect, as to the distinction between want of power and irregularity in execution of it, as affecting the question of estoppel or ratification, see, also, *State of Ohio v. Trustees of Goshen Township*, 14 Ohio St. 569 (1863).

irregularity in the bonds.¹ It is sufficient if there is reasonable certainty in the manner of voting on such bonds, the other requirements of the statute being complied with.² And the regularity of a bond issued under an old statute will be presumed after twenty-eight years.³

§ 347. **Statutes—Proof of Compliance—Ratification.**—So, if any proof is made as to obtaining the consent of taxpayers, it will be presumed to be sufficient;⁴ and if made according to the requirements of the statute, it will be conclusive in favor of a *bona fide* holder.⁵ The judgment exercised by the official executing the bond is in such case conclusive upon the corporation.⁶

And in general the legislature may ratify any contract of a municipal corporation, which is irregular or *ultra vires*, if it could originally have authorized it.⁷ Thus, where the statute originally authorized an election for the issue of bonds with interest payable annually and the bonds voted on and issued bore interest payable semi-annually, this defect was cured in the hands of a *bona fide* holder by subsequent legislation.⁸ But the legislature cannot, it has been held, ratify bonds which are void for want of the constitutional limitation of the amount of indebtedness in the authorizing acts;⁹ or for want of the consent of the taxpayers to the bonds that were issued, as required by law.¹⁰

¹County of Jasper v. Ballou, 13 Otto 745 (1880).

²Ranney v. Baeder, 50 Mo. 600 (1872).

³Hamlin v. Board of Liquidators, 30 La. An. 443 (1878).

⁴Van Hostrup v. Madison City, 1 Wall. 291 (1863).

⁵Howland v. Eldredge, 43 N. Y. 457 (1871).

⁶Bissell v. City of Jeffersonville, 24 How. 287 (1860); 1 Dillon Mun. Corp. § 418; Commissioners of Douglas Co. v. Bolles, 4 Otto 104 (1876); Town of Coloma v. Eaves, 2 Ib. 484 (1875); Town of Venice v. Murdock, Ib. 494; City of Vicksburg v. Lombard, 51 Miss. 111 (1875).

⁷1 Edwards § 914; Thompson v. Perrine, 13 Otto 806 (1880); Town of Queensbury v. Culver, 19 Wall. 83 (1873); Town of Duaneburgh v. Jenkins, 57 N. Y. 177 (1874); People, ex rel. Albany, &c., R. R. Co., v. Mitchell, 35 Ib. 551 (1866); Williams v. Town of Duaneburgh, 66 Ib. 129 (1876). See, too, Alexander v. Commissioners, 70 N. C. 208.

⁸Cutler v. Board of Supervisors, 56 Miss. 115 (1878).

⁹Fisk v. City of Kenosha, 26 Wis. 23 (1870).

¹⁰Horton v. Town of Thompson, 71 N. Y. 513 (1877), reversing 7 Hun 452. And see People, ex rel. Dunkirk, &c., R. R. Co., v. Batchellor, 53 N. Y. 128 (1873).

III. GOVERNMENTS.

348. Governments as Parties.

349. Bills of Credit.

350. Authority of Public Officers.

351. Actions by and against Public Agents.

§ 348. **Governments as Parties.**—There is nothing in the nature of commercial paper to render its execution by a State or government impossible, although instruments issued by governments as security for public debts generally take the form of bonds, either with or without coupons. Government bonds, payable to bearer or otherwise negotiable in form, are negotiable instruments and may be transferred as such.¹ If, however, their negotiability is restricted, *e. g.* by a special indorsement, their transfer is from that time subject to defense, and if stolen after such indorsement, the bond may be recovered in trover even from a *bona fide* purchaser for value.² In order to constitute a valid security, any bond or negotiable obligation of the State must be issued under the authority of the constitutional and statute law.³

§ 349. **Bills of Credit.**—The constitution of the United States provides that “no State shall emit bills of credit.”⁴ And the original draft contained a clause, which was stricken out in convention, giving to Congress power “to emit bills on the credit of the United States.”⁵ Bills of credit have been variously defined. The evil aimed at was the issue of paper money, and the phrase was, without doubt, intended

¹So held as to U. S. treasury notes in *Vermilye v. Adams Exp. Co.*, 21 Wall. 138 (1874); *Dinsmore v. Duncan*, 57 N. Y. 573 (1877); *Seybel v. Nat. Currency Bank*, 54 *Ib.* 288 (1873); *Frazer v. D’Invilliers*, 2 Penna. St. 200 (1845); *Murray v. Lardner*, 2 Wall. 118. And as to State bonds in *Delafield v. State of Illinois*, 2 Hill 177 (1841); *Finnegan v. Lee*, 18 How. Pr. 186; *Railroad Companies v. Schutte*, 13 Otto 118 (1880). And as to detached government coupons, *Spooner v. Holmes*, 102 Mass. 503 (1869); and as to indorsement by a State of a negotiable railroad bond, *State v. Cobb*, 64 Ala. 128 (1879).

²*Myers v. Friend*, 1 Rand. 12 (1821).

³*Bond Debt Cases*, 12 So. Car. 200 (1879).

⁴Art. 1 § 10.

⁵2 Curtis Hist. U. S. Const. 328. This clause, if adopted, would have expressly authorized what are now known as the “Greenbacks.”

to designate such money.¹ Under this section of the constitution State certificates issued in small denominations were held to be void as bills of credit, although they were not a legal tender and were made payable with interest and receivable for taxes and debts due to the State.² But State bank bills have been held not to be bills of credit.³ So, too, interest coupons attached to State bonds are not bills of credit, although negotiable in form and issued on the credit of the State and receivable in payment of taxes."⁴

§ 350. **Authority of Public Officers.**—The government of

¹Thus, Chief Justice Marshall says, in *Craig v. State of Missouri*, 4 Pet. 410, 432 (1830): "To emit bills of credit conveys to the mind the idea of issuing paper intended to circulate through the community as money, which paper is redeemable at a future day. * * * Bills of credit signify a paper medium intended to circulate between individuals and between government and individuals for the ordinary purpose of society." In the same case, McLean, J., says, p. 454: "To constitute a bill of credit within the meaning of the constitution it must be issued by a State and its circulation as money enforced by statutory provisions. It must contain a promise of payment by the State generally when no fund has been appropriated to enable the holder to convert it into money. It must be circulated on the credit of the State, not that it would be paid on presentation but that the State at some future period, on a time fixed or resting in its own discretion, would provide for the payment." But Thompson, J., says: "If being used as a circulating medium or substitute for money makes these certificates bills of credit, bank notes are more emphatically such. * * * And if they (the States) can issue bank notes because they are bills of credit, they cannot authorize others to do it." And in *Briscoe v. Bank of Commonwealth*, 11 Pet. 257, 314 (1837), McLean, J. defines a bill of credit to be a paper issued by the sovereign power containing a pledge of its faith and designed to circulate as money; and so, *obiter*, *Woodruff v. Trapnall*, 10 How. 205 (1840). In *Craig v. State of Missouri*, *supra*, Thompson, J., defines a bill of credit to be "a bill drawn and resting merely upon the credit of the drawer as contradistinguished from a fund constituted or pledged for the payment of the bill," p. 447.

²*Craig v. State of Missouri*, *supra*, Thompson, McLean and Johnson, JJ., dissenting, the latter on the ground that the certificate drew interest and was received for taxes. And in the *City Nat. Bank v. Mahan*, 21 La. An. 753 (1869), Louisiana State certificates issued in small denominations payable to bearer "in the similitude of ordinary bank bills and actually circulated as money" (Ludeling, J.,) under a statutory authority "to issue on behalf of the State from time to time for the purpose of paying the current expenses of the State * * * a sum not exceeding two million dollars in certificates of indebtedness," were held to be unconstitutional bills of credit.

³*Briscoe v. Bank of the Commonwealth*, 11 Pet. 257 (1837); *Darrington v. Bank of Alabama*, 13 How. 12 (1851); notwithstanding the suggestion of Thompson, J., *contra*, in *Craig v. State of Missouri*, 4 Pet. 449; and notwithstanding that the State held all the stock and pledged its faith for the redemption of the notes, *Darrington v. Bank of Alabama*, *supra*.

⁴*Poindexter v. Greenhow*, 5 S. C. Rep. 903; 20 Cent. L. J. 417 (U. S. S. C., April 20, 1885).

the United States, it has been held, may, by its authorized officers, become a party to negotiable paper, with all the rights and liabilities of an individual party except the liability to be sued.¹ It is doubtful, however, whether there is any officer so authorized to bind the government by his drawing or accepting of a bill of exchange, or his execution of a promissory note in the name of the government. Thus, it has been held that the acceptance of a bill of exchange, drawn on the secretary of war for supplies needed by, and furnished to, the war department, and accepted by him in the words "John B. Floyd, Secretary of War," will not render the government liable as acceptor.²

The authority of government agents is matter of public notoriety and must be strictly construed. An agent, for instance, who is authorized to borrow money for a State by a sale of its bonds, cannot, without express authority, make such sale on credit.³

Where the government has become the holder of a bill of exchange, the indorsers will be discharged by negligence on its part in the same manner as by negligence on the part of an individual holder.⁴ But, as has been said, the State cannot be sued upon its obligations, except where provision is made therefor by the constitution of the United States. It cannot be sued upon a warrant given by the State auditor.⁵ Nor can it be compelled, by bill in equity, to suffer the allowance of a set-off against a claim due to it.⁶ On the

¹United States *v.* Bank of the Metropolis, 15 Pet. 377 (1841). And if the government pays a check on a forged indorsement and fails to give reasonable notice on discovery of the fraud, it will lose its right of action for the recovery of the money, like a private holder, United States *v.* Central Nat. Bank, 6 Fed. Rep. 134 (1881). So, a State may become liable as an indorser of negotiable railroad bonds, State *v.* Cobb, 64 Ala. 127 (1879). And a suit against the State tax collector for an unlawful tax levy under the Virginia "Coupon Killer" Act, is not a suit against the State, Poindexter *v.* Greenhow, 20 Cent. L. J. 417; 5 S. C. Rep. 903 (U. S. S. C., 1885). But see, *dissenting*, opinion of Bradley, J., 5 S. C. Rep. 962.

²Floyd Acceptances, 7 Wall. 666 (1868); Nelson, Grier and Clifford, JJ., *dissenting*.

³State of Illinois *v.* Delafield, 8 Paige 527 (1840).

⁴United States *v.* Barker, 12 Wheat. 559 (1827).

⁵Green *v.* State, 53 Miss. 148 (1876); State *v.* Dubuclet, 23 La. An. 267

⁶Raymond *v.* State, 54 Miss. 562 (1877).

other hand, if it has issued its obligations with a provision that they should be received in payment of debts due the State, it cannot, without violation of the United States constitution, repeal such provision so as to affect obligations so issued and then in circulation.¹

§ 351. **Actions—By and Against Public Agents.**—If a bill or note is made to an agent of the United States for money due to the government, it may bring suit upon it in its own name without indorsement.² On the other hand, a tax collector, taking a note in his own name for taxes due to the State, cannot sue on it in such name.³ So, a land agent of the government, taking a note in his official capacity for public timber sold by him, cannot sue upon it.⁴

But while, in general, an agent cannot render his government liable on a note or bill of exchange for want of authority, he will not, on the other hand, make himself individually liable on such paper, if it appear to be executed in his official capacity only.⁵ Thus, an Indian agent will not become individually liable on an official contract for transportation.⁶ So, the indorsement of a note by "A. B., Sheriff," is notice of his official capacity to all takers and will not render him personally liable.⁷

¹Woodruff v. Trapnall, 10 How. 190 (1850); Poindexter v. Greenhow, 5 S. C. Rep. 903 (U. S. S. C. 1885).

²Dugan v. United States, 3 Wheat. 172 (1818); United States v. Boice, 2 McLean 352 (1841).

³Dickson v. Gamble, 16 Fla. 687 (1878).

⁴State v. Boies, 11 Me. 474 (1834); even though the note be non-negotiable, Irish v. Webster, 5 Me. 171 (1827).

⁵Balcombe v. Northup, 9 Minn. 172 (1863). So held, also, of a bill drawn on the French Government by the French Consul-General, Jones v. Le Tombe, 8 Dall. 384 (1798).

⁶Parks v. Ross, 11 How. 362 (1850).

⁷Renshaw v. Wills, 38 Mo. 201 (1866).

CHAPTER XI.

CAPACITY—PRINCIPAL AND AGENT.

- I. Liability of Principal.*
II. Liability of Agent.
III. Defenses.
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I. LIABILITY OF PRINCIPAL.

352. General Principles—Parol Appointment.
 353. Parol Appointment.
 354. Joinder of Principals.
 355. Agents—Sub-agents.
 356. Express Authority.
 357. Strictly Construed.
 358. Implication from Other Express Powers.
 359. Construction of Express Powers.
 361. Accommodation and Pledge—Not Included in General Powers.
 362. Authority Implied from Declarations and Conduct.
 363. from Recognition of Similar Acts.
 364. by Necessary Implication.
 365. from Relation of Parties.
 366. from Official Employment.
 367. for Corporations.
 368. from Official Character—President.
 370. Cashier.
 371. Teller—Secretary—Treasurer.
 372. Municipal Officers.
 373. from Blanks.
 374. Ratification—General Principles.
 375. What Acts Amount to.
 376. by Acquiescence.
 377. Termination of Agency.

§ 352. **General Principles.**—Questions of authority to execute commercial paper are similar to questions of the capacity of a maker or indorser. Such questions occur chiefly where instruments of this character are executed by an agent or by a partner for his firm. The proper form and manner of execution of such instruments has been already considered in an earlier part of this work. It is not necessary that an agent should be capable of contracting in his own right. Thus, an infant, a married woman, or an alien may be competent to act as an agent.¹ So, in times when a slave could

¹ Byles 32; Clitty 36; Co. Litt. 52a; 1 Daniel 260; 1 Parsons 91.

not make a contract for himself, he could be the agent of another.¹ An agent must, however, have sufficient intelligence to know what he is about. An idiot or insane person cannot, therefore, be an agent. Many States provide by statute for the execution of bills and notes by an agent.²

§ 353. **Parol Appointment.**—For the purpose of executing such an instrument it is not necessary that the agent's authority should be given in any particular form. His appointment may be a verbal one.³ And even the agent of a corporation may be appointed in this manner,⁴ and may under parol authority make bills and notes which will be binding upon it.⁵

A verbal authority is not, however, sufficient for the making of a sealed note, except where all distinction between sealed contracts and others has been abolished.⁶ But where verbal authority has been given to an agent to make purchases on

¹ *Governor v. Daily*, 14 Ala. 469 (1848); *Bryant v. Sheely*, 5 Dana 530 (1837).

² In *Idaho* express provision is made for notes executed by an agent (Rev. L. 1875 p. 652 § 2).

So, in *Michigan* (1 Comp. L. 1871 p. 515 § 2).

So, in *Nevada* (1 Comp. L. 1873 c. 5 § 10).

So, in *New Jersey* (1795 Pat. Rev. p. 342 § 4; 1874 Rev. p. 897 § 1).

So, in *New York* (2 R. S. ed. 1875 p. 1160 § 2; 1 R. S. 1801 p. 151).

So, in *Oregon* (1872 G. L. p. 718 c. 48 § 2).

In *South Carolina* a note executed for the maker by an agent and negotiated by the agent within nine months after his principal's death is binding on the principal's estate in the hands of a *bona fide* holder (1873 R. S. p. 319 § 9).

³ *Bytes* 32; *Chitty* 36; 1 *Daniel* 262; 1 *Parsons* 100; *Davison v. Robertson*, 3 *Dowl.* 229; *Porthouse v. Parker*, 1 *Campb.* 82; *Harrison v. Jackson*, 7 *T. R.* 209; *Rex v. Bigg*, 3 *P. Wms.* 432; *Trundy v. Farrar*, 32 *Me.* 225 (1850); *Forsyth v. Day*, 46 *Ib.* 176 (1858); *Turnbull v. Trout*, 1 *Hall* 336 (1828); *Handside v. Cameron*, 21 *Ill.* 588 (1859); *Humphreys v. Wilson*, 44 *Miss.* 328 (1870). In *Handside v. Cameron*, *supra*, the agent signed the principal's name at his request in his presence.

⁴ *Bank of Columbia v. Patterson*, 7 *Cranch* 305; *Fleckner v. Bank of U. S.*, 8 *Wheat.* 338, 357; *Bank of Washington v. Peirson*, 2 *Cranch C. C.* 685 (1826); *Right Worthy, &c., Odd Fellows v. First National Bank*, 42 *Mich.* 461 (1880). Or he may be appointed by a resolution of the directors not reduced to writing and provable by parol, *Preston v. Missouri, &c., Lead Co.*, 51 *Mo.* 43 (1872).

⁵ *Chitty* 36; *Co. Litt.* 94b; 1 *Salk.* 191; 1 *Edwards* § 62; *Rex v. Bigg*, 3 *P. Wms.* 432; *Bank of Columbia v. Patterson*, 7 *Cranch* 305 (1813); *Union Bank v. Ridgely*, 1 *Harr. & G.* 324 (1827). And in general neither corporate seal nor resolution of directors is necessary to the validity of a corporation contract, *Hoag v. Lamont*, 60 *N. Y.* 101 (1875).

⁶ *Delius v. Cawthorn*, 2 *Dev.* 90 (1829).

credit and he has given a sealed note in payment, his principal might be liable for the consideration, though not for the note.¹ And in Tennessee it has been held that a general parol authority to give and transfer notes will render the principal liable on an assignment of a negotiable instrument, although made under seal.²

It is evident that an indorsement by an agent in his principal's name and presence, and by his consent, is sufficient to bind the principal.³ So, where an indorsement is made by one of two payees who are not partners, in the name of both, with the consent of the other, it will be sufficient to bind both, although authorized only by parol.⁴ But where there is express authority "to draw checks, indorse notes, and generally to do all and every act and deed towards the execution" of the principal's business at a certain bank, the principal cannot limit his liability, so as to exclude any indorsement negotiable at such bank within the language of the power, by showing that the power had been declared verbally by him to relate only to the renewal of certain accommodation paper in a particular transaction.⁵

§ 354. **Joinder of Principals.**—Where, however, power to execute such paper "for us" is given by several, it extends only to paper executed for them jointly.⁶ But one of several partners may authorize a clerk of the firm to accept bills or make or indorse notes in its name.⁷ If, however, the authority is given by one to make notes or bills for him, it will not include bills or notes made for his firm.⁸

¹ *Ruffin v. Mebane*, 6 Ired. Eq. 507 (1850).

² *Bailey v. Rawley*, 1 Swan 295 (1851).

³ *Woodbury v. Woodbury*, 47 N. H. 11 (1866); *Morse v. Green*, 13 *Ib.* 32 (1842); *Haven v. Hobbs*, 1 Vt. 238 (1828); *Handyside v. Cameron*, 21 Ill. 588 (1859).

⁴ *Cooper v. Bailey*, 52 Me. 230 (1863).

⁵ *Mann v. King*, 6 Munf. 428 (1819).

⁶ And successive indorsement of all the principals' names is not a proper execution of a power to indorse for them jointly, *Bank of the United States v. Beirne*, 1 Gratt. 234, 539 (1844).

⁷ *Tiller v. Whitehead*, 1 Dall. 269 (1788).

⁸ *Attwood v. Munnings*, 7 B. & C. 278; S. C., 1 M. & Ry. 66.

Nor will a power to make a bill of exchange for the principal include power to give a joint bill in the name of the principal and the agent.¹ So, if power is given to an agent to sign a note, the principal saying that he "did not wish to go out of the family for security," the agent cannot execute a note for the principal with some other person as surety.² It has been held, however, in Ohio that power to an agent to execute a note for the principal will cover the case of a note executed in his name jointly with other parties interested.³ But an authority given to a wife to indorse a note for her son in the husband's name has been held not to cover the case of a joint note executed by her in his name as a joint maker with another person.⁴

§ 355. **Joinder of Agents—Sub-agents.**—Again, if the resolution of a board of directors authorizes four of its number to execute an instrument for the corporation, and the paper is executed by only three, the company will not be bound.⁵ So, one of several official liquidators, appointed under the statute for winding up a corporation, cannot, by his single acceptance, bind either the company or his co-liquidators.⁶ And, in general, power conferred on several jointly must be executed by all.⁷ So, if a company, by its directors, authorizes the president and cashier to execute instruments for it, this will not render it liable on a draft executed by the president alone.⁸

It is also true that an agent cannot delegate his authority so as to render his principal liable upon a bill or note given

¹ *Stainback v. Read*, 11 Gratt. 281 (1854); *Bryan v. Berry*, 6 Cal. 394 (1856).

² *First National Bank v. Gay*, 63 Mo. 33 (1876).

³ *Layet v. Gano*, 17 Ohio 466 (1848).

⁴ *Cuyler v. Menifield*, 5 Hun 559 (1875); *Mechanics' Bank v. Schaumburg*, 38 Mo. 228 (1866).

⁵ *Ducarry v. Gill*, 4 C. & P. 121; S. C., M. & M. 450.

⁶ *In re London, &c., Bank*, L. R. 5 Ch. 567 (1870).

⁷ Story on Agency § 42; *Union Bank v. Beirne*, 1 Gratt. 226 (1844). And see *Rollins v. Phelps*, 5 Minn. 463 (1861). And a joint power to two persons cannot be executed by the survivor, *Hartford F. I. Co. v. Wilcox*, 57 Ill. 180 (1870).

⁸ *Ridgway v. Farmers Bank*, 12 Serg. & R. 264 (1824). But if both the officers empowered agree, it seems that one may execute the paper, *Id.*; *Fleckner v. United States Bank*, 8 Wheat. 362.

by his sub-agent.¹ He may, however, delegate to another the mere manual act of signing the paper in his presence.² Thus, where a general agent has authority to accept a bill, his book-keeper may sign the acceptance by his direction so as to bind the principal.³ In like manner, where A. authorizes B. to borrow money for him and give his note for it, and B. borrows the money, and D., at his request and in his presence, signs the note "A. by D.," this will bind A. as his note.⁴

§ 356. **Express Authority.**—Where the power of the agent is a limited one, the principal will not be liable beyond the limits he has assigned, so far as regards original parties to the transaction and others with notice.⁵ So, where an agent, authorized to draw a check for his principal, has overdrawn his account by collusion with the book-keeper of the bank, the principal will not be liable to the bank for such checks drawn in excess of his authority.⁶ But where the authority was a general one in a letter authorizing the agent to draw on his principal to the amount of £10,000, and the power had been exhausted by drafts to this extent, and a further amount was afterwards obtained by the agent on a similar draft from one who neither knew of the letter of authority nor of the fact that it had been exhausted, recovery on such subsequent bill was allowed against the principal, the money obtained on it having been applied to his use.⁷

§ 357. **Express Authority Strictly Construed.**—As a rule, special authority to accept or indorse commercial paper is to

¹ Daniel 263; 1 Parsons 105; Combe's Case, 9 Coke 75; Palliser v. Ord, Bunb. 166; Emerson v. Providence Hat Manuf. Co., 12 Mass. 237 (1815); Brewster v. Hobart, 15 Pick. 302 (1834).

² Lord v. Hall, 9 L. J. C. P. 147; S. C., 8 C. B. 627; *Ex parte Sutton*, 2 Cox 84; Coles v. Trecothick, 9 Ves. 234. And this is true of an official indorsement of a return on a writ, Ellis v. Francis, 9 Ga. 325 (1851).

³ Commercial Bank of Lake Erie v. Norton, 1 Hill 501 (1841).

⁴ Weaver v. Carnall, 35 Ark. 198 (1879).

⁵ Chitty 37; Fenn v. Harrison, 3 T. R. 757; East India Co. v. Hensley, 1 Esp. 111; Sykes v. Giles, 5 M. & W. 645.

⁶ Union Bank of N. Y. v. Mott, 39 Barb. 180 (1863).

⁷ Withington v. Herring, 5 Bing. 442.

be strictly construed.¹ Thus, a power of attorney, enumerating certain objects "and all other acts," will not include power to make a bill of exchange.² Nor will a power to accept or indorse commercial paper be included in a general power to transact business, and receive and pay debts,³ or to regulate and take account of earnings, distribute expenses, regulate the running of boats, maintain offices, &c.⁴

But a power to transact all the principal's business in a certain county has been held to authorize the transfer of a note belonging to the principal.⁵ So, an authority given by the directors of a corporation to the president, bestowing "full power and control of all its business," will enable him to borrow money for the corporation and execute a note in its name for payment.⁶ So, where a principal said that he would stand to whatever arrangement his agent made, he was held liable for a note given by the agent in the transaction contemplated.⁷ So, where he agreed in a letter addressed to the agent "to become responsible for all contracts made by him for machinery, &c., for the use of his factory."⁸ So, if the principal put money into the hands of his agent with power "to manage, loan, control and collect," he would have authority to bind his principal by extending the time for payment of a note belonging to him.⁹ So, an authority "to sign my name where expedient in the transaction and conduct of such business as to my attorney shall seem meet,"

¹ Byles 33; 1 Edwards § 79.

² *Rossiter v. Rossiter*, 8 Wend. 494 (1832). Nor does such power extend to an acceptance, *Attwood v. Munnings*, 7 B. & C. 278; S. C., 1 M. & R. 78; or indorsement, *Esdaile v. La Nauze*, 1 Y. & C. 394.

³ Byles 33; Chitty 39; 1 Parsons 106; *Hogg v. Smith*, 1 Taunt. 347; *Murray v. East India Co.*, 5 B. & Ald. 204; *Gardner v. Baillie*, 6 T. R. 591, overruling *Howard v. Baillie*, 2 H. Bl. 618; *Kilgour v. Finlyson*, 1 H. Bl. 155.

⁴ *Beach v. Vandewater*, 1 Sandf. 277 (1848).

⁵ *Newland v. Oakley*, 6 Yerg. 489 (1834).

⁶ *Castle v. Belfast Foundry Co.*, 72 Me. 167 (1881). But authority to manage a store and sell and purchase goods for it will not enable such agent to borrow money and bind his principal by notes given for such loans, *Perkins v. Boothby*, 71 *Ib.* 91 (1880).

⁷ *Tanner v. Hastings*, 2 Bradw. 283 (1878).

⁸ *Frost v. Wood*, 2 Conn. 23 (1816).

⁹ *Hurd v. Marple*, 2 Bradw. 402 (1878); S. C., 10 *Ib.* 418 (1881).

will cover a note given by the agent.¹ But it has been held that a power "to use and sign my name" will not include the execution of a non-negotiable note for the payment of a debt with a clause for attorney's fees on non-payment.² In like manner, power to an agent to act in a partition matter for his principal authorizes the execution of a note, if necessary for the transaction of the business.³ But where an agent was put in charge of a tract of land with authority to advance money for the taxes, it was held that the principal was not liable on a note given by the agent in the principal's name for such taxes.⁴ So, it was held that an agent authorized to make advances on consignments and draw on his principal for the amount could not draw against consignments made by himself.⁵ An agent may, however, draw in his own name upon his principal in execution of an authority "as my agent to make drafts on me."⁶

§ 358. **Implication from Other Express Power.**—It has been held, furthermore, that authority to accept a bill of exchange cannot be implied from an authority to pay it.⁷ Nor will authority to collect rents include the power to indorse a check payable to the principal received in payment for them;⁸ or to give a note for the employment of counsel in making such collection.⁹ Nor will power to collect a bill of exchange include power to sell it.¹⁰ So, an attorney-at-law receiving

¹*Dollfus v. Frosch*, 1 Denio 367 (1845).

²*First National Bank v. Gay*, 63 Mo. 33 (1876).

³*Layet v. Gano*, 17 Ohio 466 (1848).

⁴*Webber v. Williams College*, 23 Pick. 302 (1839).

⁵*Schimmelpennick v. Bayard*, 1 Peters 264 (1828).

⁶*Merchants Bank v. Griswold*, 72 N. Y. 472 (1878).

⁷*Gould v. Norfolk Lead Co.*, 9 Cush. 338.

⁸*Robinson v. Chemical Nat. Bank*, 86 N. Y. 407 (1881).

⁹*Layet v. Gano*, 17 Ohio 466 (1848).

¹⁰*Goodfellow v. Landis*, 36 Mo. 168 (1865); *Smith v. Johnson*, 71 *Ib.* 382 (1880); *Thompson v. Elliot*, 73 Ill. 221; *Padfield v. Green*, 85 *Ib.* 529. So, too, in the case of a power to one joint payee to collect for the other, *Ryhiner v. Feickert*, 92 Ill. 305 (1879). And an agent to hold and collect a note for the payee has no authority to pledge or dispose of it after it becomes due, *Templeton v. Poole*, 59 Cal. 286 (1881). So, power to sell goods and take a note for the principal will not imply power to receive payment of the note after its delivery to the principal, *Draper v. Rice*, 56 Iowa 114

an overdue note for collection is not thereby authorized to dispose of it.¹

And authority given to an agent to sell a note will not include authority to bind the principal by a guaranty of it.² Although it has been held that power given to a broker to sell cotton by sample includes power to warrant it.³ Power to purchase goods and pay for them, will not authorize the agent to give a bill or note in payment;⁴ or to accept a bill for the same purpose.⁵ So, authority to sell "for cash" will not authorize an agent to take a note in payment, and the principal may disavow the note and sue for the value of the goods.⁶ So, power to sell goods does not imply power to indorse a note received for them.⁷ So, power to receive money from a third person by drawing upon him does not authorize the agent to draw a bill payable to his own order on such third person.⁸

§ 359. **Construction of Express Powers.**—An authority "to do all acts in my name concerning certain operations" referred to and to sign the principal's name to any "Company Articles," will not render the principal liable on a note given by the agent.⁹ So, where authority is given to an agent to make a note for a particular purpose, he has no authority to do so for any other purpose.¹⁰ Thus, if authorized to buy grain, and draw bills on his principal in payment, he cannot buy tobacco and bind his principal by bills drawn for that.¹¹ Or if authorized to draw a note for dis-

(1881). So, an agent authorized to collect a note is not thereby authorized to give construction to a doubtful word in it so as to bind his principal, *Van Vechten v. Smith*, 59 *Ib.* 173 (1882).

¹ *Goodfellow v. Landis*, 36 Mo. 168 (1865).

² *Graul v. Strutzel*, 53 Iowa 712 (1880).

³ *Andrews v. Kneeland*, 6 Cow. 354 (1826).

⁴ *Mills v. Carnly*, 1 Bosw. 159 (1857); *Brown v. Parker*, 7 Allen 337.

⁵ *Gould v. Norfolk Lead Co.*, 9 Cush. 338.

⁶ *State of Wisconsin v. Torinus*, 24 Minn. 332 (1877).

⁷ *Bank of Hamburg v. Johnson*, 3 Rich 42 (1846).

⁸ *Hogarth v. Wherley*, L. R. 10 C. P. 530 (1875).

⁹ *Washburn v. Alden*, 5 Cal. 463 (1855).

¹⁰ *Nixon v. Palmer*, 8 N. Y. 398 (1853).

¹¹ *Hopkins v. Blane*, 1 Call 361 (1798).

count to obtain a loan, he has no power to give a note for groceries purchased by himself so as to bind his principal.¹

In like manner, if authorized to make a note payable at a particular bank and to it, he cannot give a note payable in any other way.² Or if authorized to give a note payable in six months, he cannot give a note payable sooner.³ So, if authorized to draw a bill of exchange at four months, he cannot make it payable sooner so as to bind his principal by ante-dating it.⁴ But it has been held that authority to renew a note in sixty or ninety days will cover the indorsement of a note payable in eighty-eight days.⁵

§ 360. The acceptor of a bill by his acceptance admits the authority of the drawer as such, where the bill is drawn by an agent; but this does not include an admission of his authority to indorse, though the indorsement was on the bill at the time the acceptance was given.⁶ Where power is given to an agent to obtain discount for his principal without restriction, power to indorse will be implied;⁷ but not power to pledge a bill as security for the individual debt of the agent.⁸

Under the same rule of strict construction it has been held that power to give a bond does not include a note,⁹ or *vice versa*.¹⁰ So, power to give "any note or other instrument of writing" will not authorize a bill single.¹¹ Power to purchase land and pay by draft on the principal will not author-

¹ *Hortons v. Townes*, 6 Leigh 47 (1835).

² *Morrison v. Taylor*, 6 T. B. Mon. 82 (1827).

³ *Batty v. Carswell*, 2 Johns. 48 (1806). But see *Adams v. Flanagan*, 36 Vt. 412 (1863), where a thirty-day note was considered an immaterial departure from a verbal authority for a twenty-day note.

⁴ *Tate v. Evans*, 7 Mo. 419 (1842).

⁵ *Bank of the State of S. C. v. Herbert*, 4 McCord 89 (1827).

⁶ *Robinson v. Yarrow*, 7 Taunt. 455; *Prescott v. Flinn*, 9 Bing. 19.

⁷ *Fenn v. Harrison*, 4 T. R. 177. Although on a previous trial of the same case, where indorsing appeared to have been expressly prohibited by the principal, he was not held liable, *Ib.*, 3 T. R. 757.

⁸ *Foster v. Pearson*, C. M. & R. 849; 5 Tyrw. 225; notwithstanding any usage to the contrary, *Ib.* As to this, however, see *infra*.

⁹ *School Directors v. Sippy*, 54 Ill. 287 (1870).

¹⁰ *Mayor, &c., of Little Rock v. State Bank*, 8 Ark. 227 (1847).

¹¹ *Alder v. Buckley*, 1 Swan 69 (1851).

ize a note by the agent as attorney for him.¹ Power to give a check will not include a bill of exchange,² or a post-dated check;³ nor will such post-dated check be covered by a power "to make, sign, indorse and accept all checks, notes, drafts and bills of exchange."⁴ Authority to draw a "company note" will, however, cover a bill of exchange.⁵ But power to accept *for the principal* bills of exchange drawn by his agent or correspondent, it has been held, does not include acceptances on partnership account.⁶

§ 361. **Accommodation and Pledge—Not Included in General Powers.**—It is also to be observed that the general power to give a bill or note does not include accommodation paper;⁷ although if such accommodation paper were given by the agent with the principal's consent, and to take up other similar paper upon which he was liable, he would be bound.⁸

Authority to "sell, indorse and assign" a note will not include a transfer of it as collateral for the individual note of the agent which he has had discounted.⁹ Nor, as we have seen, can an agent, authorized to discount his principal's paper, pledge it for his own debt.¹⁰ Although an exception seems to have been made to this rule by the usage of London in favor of a broker pledging such paper, with other like paper of his principal, in order to effect the object desired by his principal.¹¹

It has also been held that power to make and discount

¹ *Sage v. Sherman, Hill & Denio* 147.

² *Bank of Deer Lodge v. Hope Mining Co.*, 3 Montana 146 (1878).

³ *Forster v. Mackreth*, L. R. 2 Exch. 163 (1867).

⁴ *Nash v. Mitchell*, 71 N. Y. 199 (1877); S. C., 3 Abb. N. C. 171.

⁵ *Tripp v. Swanzy Paper Co.*, 13 Pick. 291 (1832).

⁶ *Attwood v. Munnings*, 7 B. & C. 278; 1 M. & R. 78. See, too, *Bank of Bengal v. Macleod*, 7 Moo. P. C. 35.

⁷ *Stainer v. Tysen*, 3 Hill 279 (1842); *Sage v. Sherman, supra*; *Wallace v. Branch Bank*, 1 Ala. 565 (1840); *German Nat. Bank v. Studley*, 1 Mo. App. 260 (1876). But see, as to effect of representation by agent, *North River Bank v. Aymer*, 3 Hill 262 (1842); *Kingsley v. Bank of the State*, 3 Yerg. 107.

⁸ *German Nat. Bank v. Studley*, 1 Mo. App. 260 (1876).

⁹ *Bank of Bengal v. Macleod*, 7 Moo. P. C. 35 (1849); *Bank of Bengal v. Fagan*, *Id.* 61 (1849).

¹⁰ *Haynes v. Foster*, 2 C. & M. 237.

¹¹ *Byles* 36; *Foster v. Pearson*, 1 C. M. & R. 849; S. C., 5 Tyrw. 255.

notes does not include the power to give renewals.¹ Nor can an agent alter a note by changing the order of the indorsements upon it.² And the fact of their being accommodation indorsements implies no power of alteration.³ So, it seems that a general power to draw bills of exchange is limited to the case where the principal has funds in the drawee's hands to be drawn upon.⁴ This is true at least, where the principal specifies in the authority given, that such bills are to be drawn when he has an account to draw against.⁵

§ 362. **Authority Implied from Declarations and Conduct.**—The authority of an agent need not be expressly conferred on him, but may be implied from his conduct coupled with that of his principal.⁶ So a corporation may be bound by the act of an agent, his authority being inferred from facts and circumstances and not shown by any writing.⁷ And it is enacted by statute, in England, that bills and notes accepted, made or indorsed in the name of a company under its authority, express or implied, shall be binding upon it.⁸ So, where drafts are drawn by an agent without further written authority than a letter from the principal asking the person addressed to give A. any assistance he might need as his agent and charge it to him, other acts of the agent of like character confirmed by the principal are admissible to strengthen the implication of authority on his part to make the draft in question.⁹

¹Ward v. Bank of Kentucky, 7 T. B. Mon. 93.

²Bank of South Carolina v. M'Willie, 4 McCord 428 (1828).

³Ætna Nat. Bank v. Winchester, 43 Conn. 391 (1876).

⁴Craighead v. Peterson, 10 Hun 596; Crescent City Bank v. Hernandez, 25 La. An. 43; Stainback v. Read, 11 Gratt. 281 (1854).

⁵Craighead v. Peterson, *supra*.

⁶Chitty 40; 1 Daniel 273; Bank of Columbia v. Patterson, 7 Cranch 299; Narragansett Bank v. Atlantic Silk Co., 3 Mete. 282; Davison v. Robertson, 3 Dowl. 229; Neal v. Erving, 1 Esp. 61; Haughton v. Ewbank, 4 Campb. 188; Valentine v. Packer, 5 Penna. St. 333; Union Bank v. Ridgely, 1 Harr. & G. 324, 419 (1827); Humphreys v. Wilson, 44 Miss. 328 (1870). Although it seems that in Louisiana an express power is necessary for making a promissory note, Nugent v. Hickey, 2 La. An. 358 (1847); Avery v. Lauve, 1 Ib. 457 (1846).

⁷American Ins. Co. v. Oakley, 9 Paige 496 (1842).

⁸Lindus v. Melrose, 27 L. J. Exch. 326; 2 Hurlst. & N. 293; 25 and 26 Vict. c. 89 § 47, amended by 30 and 31 Vict. c. 131.

⁹Friedlander v. Cornell, 45 Tex. 585 (1876).

But the acts and declaration of the agent alone, unsupported by act or statements of the principal, cannot be used as evidence of the agency.¹ It has been held, however, that frequent and usual acts of the agent in subscribing his principal's name, not disavowed by the principal, are sufficient to charge him without any express power having been given.² So, if the agent has given a note in the principal's business and for his benefit, authority may be implied from this fact, as well as from acts of the principal, or the custom of his business.³ In connection with such circumstances the agent's own declarations are proper evidence to be submitted to a jury upon the question of agency.⁴ If the authority has been conferred by parol, it may be proved by the testimony of the agent, as by that of any other witness.⁵ And even where the express power given to a company's agent extends only to note, of which the consideration has gone immediately to its use, it has been held that further authority may be proved by the confession of a member of the company.⁶

§ 363. **Authority Implied from Recognition of Similar Acts.**—Agency will not, however, be implied from prior conduct of the principal, unless it amount to a plain recognition of the agent's action in the particular case or in other similar cases. Thus, it has been held that the fact that the agent managed the principal's store and had transacted banking business for him and had sold a bill of exchange and renewed a note in his name, will not amount to evidence of authority to make a note.⁷ On the other hand, payment by a principal of previous acceptances given by the agent

¹ *Poore v. Magruder*, 24 Gratt. 197 (1874); *Streeter v. Poor*, 4 Kans. 412 (1868).

² *Neal v. Erving*, 1 Esp. 61; *Haughton v. Ewbank*, 4 Campb. 188; *Watkins v. Vince*, 2 Stark. 368.

³ *Hunt v. Chapin*, 6 Lans. 139 (1872).

⁴ *National Mechanics' Bank v. Nat. Bank*, 36 Md. 5 (1872).

⁵ *Gould v. Norfolk Lead Co.*, 9 Cush. 338.

⁶ *Odiorne v. Maxey*, 15 Mass. 39 (1818).

⁷ *Smith v. Gibson*, 6 Blackf. 369.

is presumptive evidence of the agent's authority to give an acceptance.¹

The recognition and payment by a father of previous indorsements by his son, without any disclaimer until after the son had absconded, amounts to an implied authority to the son to indorse for him.² So, it has been held that where a son has been shown to have signed bills of exchange three or four times for his father and they have been recognized by him, this is sufficient to render admissible as evidence a guaranty in the father's name by the son, or in his handwriting, so as to leave the question one of fact for the jury.³ Recognition, however, by the father of a single such instrument, or silence on his part on receiving notice of a note forged in his name by his son, will not imply any authority to give such note.⁴ Nor can the son's authority to sell a note belonging to his father be implied either from possession by him with authority to receive the money due on it or from his having in several instances borrowed money for his father.⁵ But if the father has previously paid notes forged in his name by his son, knowing them to be such, this would be admissible against him as evidence of an authority.⁶ So, if he had knowingly paid acceptances of like character.⁷ But the propriety of drawing such inferences as to authority by the principal from payment of a previous forgery, has been denied in Maryland,⁸ and in Louisiana.⁹

In order that authority to bind the principal by a bill or

¹ Byles 34; Chitty 41; *Barber v. Gingel*, 3 Esp. 60; *Llewellyn v. Winckworth*, 13 M. & W. 598; *Morris v. Bethell*, L. R. 5 C. P. 51 (1869); *Kelley v. Lindsey*, 7 Gray 287 (1856). And evidence of such former habit may go to the jury to support the allegation of authority from the principal, *Commercial Bank v. Norton*, 1 Hill 501 (1841).

² *Abeel v. Seymour*, 6 Hun 656 (1876).

³ *Watkins v. Vince*, 2 Stark. 368.

⁴ *Greenfield Bank v. Craft*, 2 Allen 269 (1861).

⁵ *Ames v. Drew*, 31 N. H. 475 (1855).

⁶ *Hammond v. Varian*, 54 N. Y. 398 (1873).

⁷ *Cash v. Taylor*, Lloyd & W. 178; *Llewellyn v. Winckworth*, *supra*.

⁸ *Whiteford v. Monroe*, 17 Md. 135 (1860); *Walters v. Munroe*, 17 Md. 150 (1860).

⁹ *Ducongé v. Forgay*, 15 La. An. 37 (1860).

note may be implied from previous recognition on his part of similar acts, it is necessary that the other have taken the instrument in question on the strength of such previous recognition.¹ And it has been held that one who knowingly allows his agent to indorse notes and procure discounts in his name without taking any steps to make known the agent's want of authority, makes himself liable by such passive conduct.²

§ 364. **Implication Must be Necessary.**—Where authority to make commercial paper is inferred, this must be by necessary implication. It cannot be implied merely from an authority to purchase goods for the principal.³ So, authority to take from a buyer of goods an acceptance of a draft with the drawer's name blank, made payable "to my order" and fraudulently filled and misappropriated by the agent, is not to be implied either from a letter of the principal to the agent, saying he should like to draw upon the buyer for the goods, nor from any similar previous transaction.⁴ On the other hand, where goods have been purchased for the principal and a draft given by the agent on him in payment, authority to give the draft will be implied from his receiving the goods after full information as to the transaction.⁵

So, authority to receive payment of a note may be implied from its possession by the agent,⁶ but not, as has been already said, authority to transfer it.⁷ And possession by an agent of an *unindorsed* note gives him, it has been held, no authority to receive payment.⁸ But such authority may be implied from his having received already a partial pay-

¹St. John v. Redmond, 9 Porter 428 (1839); Rawson v. Curtiss, 19 Ill. 456 (1858); New York Iron Mine v. Citizens' Bank, 44 Mich. 344 (1880).

²Morse v. Diebold, 2 Mo. App. 163 (1876).

³Temple v. Pomroy, 4 Gray 128 (1855); Paige v. Stone, 10 Metc. 160 (1845).

⁴Hogarth v. Wherley, L. R. 10 C. P. 630 (1875).

⁵Nutting v. Sloan, 59 Ga. 392 (1876).

⁶Morris v. Foreman, 1 Dall. 193 (1787); Merritt v. Cole, 9 Hun 98 (1876), affirmed 14 *Id.* 324 (1878); Murrell v. Jones, 40 Miss. 565 (1866); Streeter v. Poor, 4 Kans. 412 (1868); Floral v. Merchant, 26 La. An. 741 (1874).

⁷Scott v. Stevenson, 3 Hun 352 (1874).

⁸Doubleday v. Kress, 50 N. Y. 410 (1872).

ment of it with the principal's knowledge and without dissent on his part.¹ So, if an agent receives authority to employ servants this has been held to authorize payment of their wages by a note given by him for that purpose.²

§ 365. **Authority—Implied from Relation of Parties.**—The authority of one person to make commercial paper or indorse it for another is often implied from their relation to one another. Thus, a cashier may bind his bank by giving a certificate of deposit, and in such case the cashier's authority may be shown from the custom of the bank.³ So, partners may bind their firm by commercial paper executed for it. But this does not extend to bills or notes executed for one another, although it has been held that previous knowledge or acknowledgment by the partner whose name is used is admissible evidence of agency, as in other cases.⁴ If, however, one partner has received authority from another to negotiate a single note belonging to him, authority cannot be implied from this to negotiate two such notes, and the transfer of the latter will not be binding on the principal.⁵ But it has been held that power to draw a bill of exchange is admissible as evidence to a jury from which they may infer power to indorse one.⁶

§ 366. **Authority Implied from Official Employment.**—As has been said, authority to make or indorse commercial paper may often be implied from the relation of the parties or the nature of the agent's employment.⁷ Such authority belongs to a general agent or factor, and a principal will be liable for all his acts.⁸ Although the authority of such

¹ *Wardrop v. Dunlop*, 1 Hun 325 (1874).

² *James v. Lewis*, 26 La. An. 664 (1874).

³ *Barnes v. Ontario Bank*, 19 N. Y. 152, 159 (1859). And such certificate does not come within the statute requiring bills and notes issued for circulation as money to be signed by the president and cashier, *Ib.*

⁴ *Stroh v. Hinchman*, 37 Mich. 490 (1877).

⁵ *Callender v. Golson*, 27 La. An. 311 (1875).

⁶ *Prescott v. Flynn*, 9 Bing. 19; S. C., 2 Moo. & Sc. 22.

⁷ *Trundy v. Farrar*, 32 Me. 225 (1850); *Forsyth v. Day*, 46 Me. 176 (1858).

⁸ *Chitty* 37; 1 *Edwards* § 79. So, a general agent appointed to carry on lumbering business for a company may give a company note for services rendered in that business, *Tappan v. Bailey*, 4 Metc. 529 (1842).

agent or factor to pledge his principal's goods did not exist until given by the statute of 6 Geo. IV., he was held to have the power at common law as to bills of exchange.¹ So, where a firm is engaged in business as a dealer in commercial paper, authority will be implied in its general cashier and financial agent to give checks and indorsements.² So, a corporation will be bound by an acceptance by its general agent on account of goods consigned to it for sale on commission.³ So, where the principal's business is managed by an agent who is the ostensible principal, the principal will be bound by his acceptance although expressly forbidden in his instructions.⁴ So, a corporation will be liable on a note incidental to its business given by its general agent.⁵

But it will not be inferred that an agent for managing a farm has authority to bind his principal by giving a bill of exchange.⁶ Nor can the manager of a store do so;⁷ nor the master,⁸ or supercargo of a vessel;⁹ nor a merchant's clerk.¹⁰ Nor can a clerk acting outside of his regular employment and without authority bind his principal by a bill of lading.¹¹ In cases of this sort the question whether an authority can be inferred will sometimes depend on whether the giving of such paper has been for goods or other things necessary to

¹ *Newsome v. Thorton*, 6 East 21; *Martin v. Coles*, 1 Maule & S. 140; *Solly v. Rathbone*, 2 M. & S. 298; *Ginchard v. Morgan*, 4 Moore 36.

² *Edwards v. Thomas*, 66 Mo. 468 (1877).

³ *Munn v. President, &c., Commission Co.*, 15 Johns. 44 (1818).

⁴ *Edmunds v. Bushell*, L. R. 1 Q. B. 97, 35 L. J. 21. But see *contra*, as to the power of a general agent to accept a bill of exchange, *Sewanee Mining Co. v. McCall*, 3 Head 619 (1859).

⁵ *Wallace v. Sampson*, 20 La. An. 143 (1868).

⁶ *Davidson v. Stanley*, 2 Man. & G. 721; *Nugent v. Hickey*, 2 La. An. 358 (1847); *Hills v. Upton*, 24 La. An. 427 (1872); *Meyer v. Baldwin*, 52 Miss. 263 (1876); *Robertson v. Levy*, 19 La. An. 327 (1867).

⁷ *Smith v. Gibson*, 6 Blackf. 369.

⁸ Either to draw a bill of exchange, *Bowen v. Stoddard*, 10 Metc. 375; or accept it, *May v. Kelly*, 27 Ala. 497 (1855). Nor can he, except in case of sudden and unforeseen necessity, draw a bill against the ship's cargo, *Newhall v. Dunlap*, 14 Me. 180 (1837).

⁹ *Scott v. McLellan*, 2 Me. 199 (1823).

¹⁰ *Terry v. Fargo*, 10 Johns. 114 (1813).

¹¹ *Dows v. Perrin*, 16 N. Y. 325 (1867).

the transaction of the principal's business.¹ An auctioneer's clerk has not, in general, authority to bind his principal by such paper.² Neither has the clerk of a steamboat;³ nor the purchasing agent of a carriage factory.⁴ So, an attorney-at-law receiving a note for collection has no authority to transfer it.⁵ And this is true of other collecting agents.⁶ As to the authority of an agent inferable from the possession of a bill or indorsement in blank, the reader is referred to another part of this work.

§ 367. **Corporate Authority Implied.**—It has already been said that authority from a corporation may be implied as from an individual.⁷ If, however, its charter describes a particular way in which authority to act for it must be conferred, this way must be followed and no other will be sufficient.⁸ But a statutory requirement as to the method of executing notes and bills issued by a bank for circulation as money is not to be applied to certificates of deposit or other contracts not made for that purpose.⁹ And it has been held in a recent case, that money borrowed by the officer of a corporation upon notes belonging to it and applied to its use, with the knowledge and consent of the trustees, amounts to a recognition by the company of the action of its agent and

¹*Odiorne v. Maxcy*, 13 Mass. 178 (1816).

²*Entz v. Mills*, 1 McMull. 453 (1840).

³*Anderson v. Irwin*, 7 La. An. 494 (1852).

⁴*Paige v. Stone*, 10 Metc. 160 (1845).

⁵*Russell v. Drummond*, 6 Ind. 216 (1855).

⁶*Graham v. U. S. Savings Institution*, 46 Mo. 187.

⁷*Lester v. Webb*, 1 Allen 34 (1861); *Melledge v. Boston Iron Co.*, 5 Cush. 158, 175; *Fay v. Noble*, 12 Cush. 1, 16; *Williams v. Cheney*, 3 Gray 215; *Conover v. Mut. Ins. Co.*, 1 N. Y. 290.

⁸*McCullough v. Moss*, 5 Den. 567, 575 (1846); *Catton v. First Universalist Society of Manchester*, 46 Iowa 106 (1877). Thus, the rector and wardens cannot by their note bind a church corporation whose power of action is vested by charter in the rector, wardens and vestry, *Episcopal Char. Soc. v. Episc. Church*, 1 Pick. 372 (1823). So, if the charter of a bank requires its bills to be signed by the president and cashier, the corporation will not be liable for bills signed by the vice-president and assistant cashier, *Planter's Bank v. Erwin*, 31 Ga. 371 (1860). But the bills intended in such statutory requirement are only bank bills intended for circulation, *Paine v. Stewart*, 33 Conn. 516 (1866); *Barnes v. Ontario Bank*, 19 N. Y. 152, 157 (1859).

⁹*Safford v. Wyckoff*, 4 Hill 442, 462 (1842); *Barnes v. Ontario Bank*, *supra*.

binds it, notwithstanding that the statute required a vote of the trustees for the purpose of a valid transfer of its securities.¹ But where the by-laws of a corporation require indorsements for it to be made by the secretary, an indorsement by the president to a director of the corporation chargeable with knowledge of such by-laws will not be binding upon it.² The maker of a note held and transferred by a corporation cannot object to the informal manner of the transfer, where the statute (as in a case requiring a previous resolution of the directors) is designed manifestly only for the protection of the corporation and its creditors.³

The best, though not the only, evidence of authority from a corporation to its agent is to be found in its own minutes and other records.⁴ But evidence that an agent has been acting as cashier and that his acts as such in duties properly belonging to such officer have been recognized by resolution of the directors may be sufficient proof of his official position.⁵ And where one acts and is held out as the officer of a corporation it will be presumed that he has been elected and qualified as such.⁶

§ 368. **Corporation Officers—President.**—It is a well known rule that the acts of a corporation agent will bind the corporation within their official scope.⁷ And an indorsement by

¹Creswell v. Lanahan, 11 Otto 347 (1879).

²Leavitt v. Connecticut Peat Co., 6 Blatch. 139 (1868).

³Elwell v. Dodge, 33 Barb. 336 (1861).

⁴Owings v. Speed, 5 Wheat. 420 (1820); Clark v. Farmers Manuf. Co., 15 Wend. 256 (1836); Thayer v. Middlesex Mut. Fire Ins. Co., 10 Pick. 326 (1830); Narragansett Bank v. Atlantic Silk Co., 3 Met. 286 (1841). But such proof is not necessary, Topping v. Bickford, 4 Allen 120 (1862); Bank of United States v. Dandridge, 12 Wheat. 64 (1827), so holding as to proof of approval of a cashier's official bond.

⁵Barrington v. Bank of Washington, 14 Serg. & R. 405, 421 (1826). See, too, Baldwin v. Bank of Newbury, 1 How. 234 (1863).

⁶Narragansett Bank v. Atlantic Silk Co., 3 Met. 282, 289 (1841). And where his election has been irregular, the company will still be bound by its recognition of his acts as treasurer, Partridge v. Badger, 25 Barb. 146 (1857).

⁷Merchants' Bank v. State Bank, 10 Wall. 604, 644 (1870); Commissioners of Knox Co. v. Aspinwall, 21 How. 539 (1858); Moran v. Commissioners of Miami Co., 2 Black 722 (1862); Commonwealth v. Select Councils of Pittsburgh, 34 Penna. St. 495, 519 (1859); Commonwealth v. Commissioners of Allegheny Co., 37 Penna. St. 275, 287 (1860); Elwell v. Dodge, 33 Barb. 336 (1861). And it is not necessary that the agent's act be performed at the com-

an officer of a corporation is *prima facie* the act of the corporation.¹ An officer, however, who has no connection with the business of the corporation has no authority to give a bill or note for it.²

It has even been held that the *president* of a corporation has no implied authority to bind it by a contract.³ But the directors of a banking company may authorize an agent by power of attorney to transfer a note belonging to the company.⁴ So, they may authorize the president and cashier to borrow money and give drafts for it in the company's name.⁵ And it has been held that the members of a Masonic lodge may authorize their presiding officer to bind it by a note.⁶ So, a note or acceptance given by the president of a bank, who is also its general agent and manager, with the knowledge and approval of the directors, will bind the bank.⁷

And, in general, by virtue of their office, presidents and cashiers of incorporated companies have power to indorse and transfer negotiable paper belonging to such company.⁸ A president may bind his company by indorsement of such paper.⁹ And he may transfer such paper without express authority.¹⁰ So, too, such authority may be presumed from its recognition on the face of a note itself, as in the case of a note made payable to the president as such.¹¹ And even an

pany's office, Merchants' Bank v. State Bank, *supra*; Bissell v. First Nat. Bank, 69 Penna. St. 415; Pendleton v. Bank of Kentucky, 1 T. B. Mon. 171.

¹ Frye v. Tucker, 24 Ill. 180 (1860).

² Ehrigott v. Bridge Mfy., 16 Kans. 486 (1876).

³ Mount Sterling, &c., Turnpike Co. v. Looney, 1 Metc. 550 (Ky. 1858).

⁴ Northampton Bank v. Pepoon, 11 Mass. 288 (1814). And a blank indorsement by such attorney is sufficient, *Ib.*

⁵ Ridgeway v. Farmers' Bank of Bucks Co., 12 Serg. & R. 256 (1824).

⁶ Ferris v. Thaw, 5 Mo. App. 279 (1878), 72 Mo. 446 (1880).

⁷ Libby v. Union National Bank, 99 Ill. 622 (1881).

⁸ State Bank of Ohio v. Fox, 3 Blatch. 431 (1856).

⁹ Topping v. Bickford, 4 Allen 120 (1862); Palmer v. Nassau Bank, 78 Ill. 380 (1875); Irwin v. Bailey, 8 Biss. 523 (1879). See, too, Elwell v. Dodge, 33 Barb. 336 (1861). But he cannot bind the company by an accommodation indorsement, Aetna Nat. Bank v. Charter Oak Ins. Co., 50 Conn. 167 (1882).

¹⁰ Aspinwall v. Meyer, 2 Sandf. 180 (1848). And the maker of a note cannot question the payee's capacity as a corporation to transfer it, especially at suit of a holder for value, *Ib.*

¹¹ Nichols v. Frothingham, 45 Me. 220 (1858).

indorsement by the ex-president of a corporation of a note payable to the company will be sufficient, where the proceeds of the transfer have gone to the company.¹ And, *a fortiori*, the indorsement by the president of a note payable to his order as such will transfer the company's interest in the note, where the indorsement has been expressly authorized by a vote of the board of directors.²

§ 369. But the president of a company has no power to surrender its rights or assets without express authority. He cannot, for instance, bind the company by an agreement to give up a note belonging to it in consideration of bank stock sold by the maker of the note to him.³ Nor, it seems, can he give a receipt to the maker of a note, which belongs to the company, showing the note to be a mere voucher or memorandum.⁴ Although the cashier of a bank is the proper officer to transfer or accept negotiable paper for it, the president may, by force of usage, in the absence of the cashier and while his place is supplied by a temporary cashier, bind the bank by an indorsement or by signing a draft or check.⁵ The general authority, however, which a president may possess to bind the bank by certifying a check upon it, will not extend to checks drawn individually by himself.⁶ When the management of a corporation is expressly lodged by its charter in a board of directors, the president and cashier have no power, without express authority from such directors, to transfer its assets to a creditor as security for its debts.⁷

The president of a manufacturing corporation has no authority, it has been held, even to commence an action in the name of the company.⁸ And where a solicitor, retained

¹Patten v. Moses, 49 Me. 255 (1861).

²Spear v. Ladd, 11 Mass. 94 (1814).

³Rhodes v. Webb, 24 Minn. 292 (1877).

⁴Hodge v. First National Bank of Richmond, 22 Gratt. 51 (1872).

⁵Neiffer v. Bank of Knoxville, 1 Head 162 (1858).

⁶Claffin v. Farmers' and Citizens' Bank, 25 N. Y. 293 (1862).

⁷Hoyt v. Thompson, 5 N. Y. 320 (1851). Nor can they use the corporate seal without authority of the directors, *Ib.*

⁸Ashuelot Manuf. Co. v. Marsh, 1 Cush. 507 (1848).

by him without such authority, has acted in the company's name so as to bind it, the president will be responsible to the company for damages.¹ But after the services have been rendered by an attorney to a bank under such a retainer, the directors cannot set up their disapproval of the proceedings in defense of the company's liability for fees.² And where the president of a company was a member of its finance committee, and had with the cashier employed a solicitor to carry on legal proceedings, and had attended examinations had in such proceedings, it has been held to be conclusive evidence of authority on the part of the corporation.³ But it would not in such a case be liable for the services of a co-defendant's solicitor, although such services were beneficial to the company.⁴

In like manner, the president of a bank has no authority to stay the collection of an execution against one of its debtors.⁵ So, where an insurance company has received notes for advance premiums, its president has no authority to surrender such notes.⁶ Nor, it seems, can the president agree with an indorser of paper held by the bank that he shall not be liable on his indorsement.⁷ So, the president of a bank cannot settle and release claims of the company against his official predecessor without authority expressed or plainly implied.⁸ So, where a note has been made by a bank to its president and indorsed to another bank having the same president, he has no authority to bind the first bank by an agreement that the note shall be paid out of its fund.⁹

§ 370. **Cashier.**—The *cashier* of a bank is, in general, the

¹American Ins. Co. v. Oakley, 9 Paige 496 (1842).

²Mumford v. Hawkins, 5 Den. 355 (1848).

³Mumford v. Hawkins, 5 Den. 355 (1848).

⁴Savings Bank of Cincinnati v. Benton, 2 Mete. 240 (Ky. 1859).

⁵Spyker v. Spence, 8 Ala. 333 (1845).

⁶Brouwer v. Appleby, 1 Sandf. 158 (1847).

⁷Bank of Metropolis v. Jones, 8 Pet. 12 (1834); Bank of United States v. Dunn, 6 Ib. 51 (1832); Gallery v. National Exch. Bank, 41 Mich. 169 (1879).

⁸Olney v. Chadsey, 7 R. I. 224 (1862).

⁹Gallery v. National Exch. Bank, 41 Mich. 169 (1879).

proper officer to execute a bill of exchange for it,¹ or a promissory note.² And a note given by the cashier to the president for payment of his salary and other consideration is not within the statute requiring notes issued for circulation as money to be signed both by the president and cashier.³ So, the cashier of a bank has power to bind it by his certificate of deposit,⁴ or by certifying checks drawn upon it.⁵ And even if he has certified such check where the drawer has no funds to meet it, the bank will be liable to a *bona fide* holder.⁶ The cashier of a bank is also the proper agent to indorse or accept commercial paper for it.⁷ But he has no power to give accommodation indorsements in its name,⁸ or to indorse in its name a note which has been made payable to it but has been discounted by some other party.⁹

¹Safford v. Wyckoff, 4 Hill 442; or a check, Northern Bank v. Johnson, 5 Coldw. 88. As to the power of bank cashiers, see also an article in 20 Cent. L. J. 126 (Feb. 13th, 1885), citing many American authorities.

²Ballston Spa Bank v. Marine Bank, 16 Wis. 120 (1862); Rockwell v. Elkhorn Bank, 13 *Ib.* 731.

³Rockwell v. Elkhorn Bank, 13 Wis. 731 (1861).

⁴Barnes v. Ontario Bank, 19 N. Y. 156 (1859); State Bank v. Kain, Breese 75 (1823).

⁵Merchants' Bank v. State Bank, 10 Wall. 649 (1870).

⁶Cooke v. State Nat. Bank of Boston, 52 N. Y. 96 (1873), affirming 1 Lans. 494.

⁷United States Bank v. Fleckner, 8 Mart. 309 (1820); Fleckner v. United States Bank, 8 Wheat. 338, 355 (1823); State Bank v. Fox, 3 Blatchf. 433 (1855); Potter v. Merchants' Bank, 28 N. Y. 641 (1864); Bank of the State of N. Y. v. Farmers' Branch, 29 N. Y. 619 (1864), affirming 36 Barb. 332; Folger v. Chase, 18 Pick. 63 (1836); Burnham v. Webster, 19 Me. 232 (1841); Farmers', &c., Bank v. Troy City Bank, 1 Doug. 457 (Mich. 1844); Wild v. Bank of Passamaquoddy, 3 Mason 505 (1825); Corser v. Paul, 41 N. H. 24 (1860); Houghton v. First Nat. Bank, 26 Wis. 663 (1870); Lafayette Bank v. State Bank, 4 McLean 208 (1847); Robb v. Ross County Bank, 41 Barb. 591 (1864); Hartford Bank v. Barry, 17 Mass. 93 (1821); Kimball v. Cleveland, 4 Mich. 606 (1837); Everett v. United States, 6 Port. 166 (1837); Harper v. Calhoun, 7 How. 203 (Miss. 1843); Cooper v. Curtis, 30 Me. 488 (1849); Smith v. Lawson, 18 W. Va. 212; Lanning v. Lockett, 10 Fed. Rep. 451 (1882); Blair v. First Nat. Bank, 2 Flap. 111 (1877). In Bank of State of N. Y. v. Farmers' Bank, *supra*, a distinction was made between an indorsement for transfer or collection and an indorsement "for the purpose of making the bank liable on a contract of indorsement," and the latter was spoken of as not lying within the cashier's authority. This distinction is, however, not a sound one and the decision has been overruled on another point, Robb v. Ross County Bank, 41 Barb. 593 (1864). The cashier's power to accept a bill for the bank was questioned in Pendleton v. Bank of Kentucky, 1 T. B. Mon. 180 (1824).

⁸West St. Louis Bank v. Shawnee Bank, 5 Otto 557 (1877). But see Houghton v. First Nat. Bank, 26 Wis. 663 (1870).

⁹Elliot v. Abbot, 12 N. H. 557 (1842).

The cashier of a bank is the proper officer to forward its notes for collection.¹ A bank may authorize its cashier to transfer notes and other security belonging to it in payment of its debts.² And, in general, authority to make such transfer is implied from his official character.³ Purchasing gold has been held to be within the general powers of a bank cashier.⁴ So, he may sell a bill of exchange and bind the bank by a warranty that it is "perfectly safe."⁵ But he has no power to transfer a non-negotiable note belonging to the bank,⁶ or to assign a judgment rendered in its favor.⁷ His authority to pledge negotiable securities held by the bank under a written agreement made by him as cashier for advances will be presumed, where he has frequently transacted such business for his bank.⁸

A bank may also be bound by way of estoppel by representations made by a cashier to the sureties on a note held by it inducing them to believe it paid and therefore to give up collaterals held by them.⁹ But it seems that this is not so, where the surety is a director of the bank and has means of ascertaining the truth of the statement for himself.¹⁰ The cashier cannot bind the bank by a promise to refund moneys paid to it on a forged certificate of deposit from another bank.¹¹ If, however, notes have been placed in a bank on special deposit and exchanged by the cashier for other securities and indorsed by him for the purpose of such exchange,

¹ *Burnham v. Webster*, 19 Me. 232 (1841).

² *Crockett v. Young*, 1 Sm. & M. 241 (1843).

³ *Everett v. United States*, 6 Port. 166 (1837); *Farrar v. Gilman*, 19 Me. 440 (1841); *Harper v. Calhoun*, 7 How. 203 (Miss. 1843); *Hartford Bank v. Barry*, 17 Mass. 93 (1821); *City Bank of New Haven v. Perkins*, 29 N. Y. 554 (1864).

⁴ *Merchants' Bank v. State Bank*, 10 Wall. 649 (1870).

⁵ *Sturges v. Bank of Circleville*, 11 Ohio St. 156 (1860).

⁶ *Barrick v. Austin*, 21 Barb. 241 (1855).

⁷ *Holt v. Bacon*, 25 Miss. 567 (1853).

⁸ *Mercantile Bank v. McCarthy*, 7 Mo. App. 318 (1879).

⁹ *Cocheco Nat. Bank v. Haskell*, 51 N. H. 116 (1871); *Merchants' Bank v. Rudolph*, 5 Neb. 527 (1877); *Grant v. Cropsey*, 8 Neb. 205 (1879).

¹⁰ *Merchants' Bank v. Rudolph*, 5 Neb. 527 (1877).

¹¹ *Merchants' Bank v. Marine Bank*, 3 Gill 96 (1845).

the bank will be liable to its depositor for such act.¹ So, notice to a cashier that a draft will not be paid is notice to the bank, although the cashier may have had no power to discount notes for the bank.²

§ 371. **Other Officers—Teller—Secretary—Treasurer.**—An *assistant cashier* cannot bind the bank without authority by accepting a post-dated check.³ But it has been held that a check may be certified by the teller so as to bind the bank.⁴ And the bank will be liable on such certification, although the checks were not drawn against funds in bank and the teller had no authority to certify them.⁵

The business of a *paying teller* not extending to the receipt of money in a bank having also a cashier and a receiving teller, the bank will not be liable in an action by the drawer of a bill payable at the bank, on the ground that funds were left for its payment with the paying teller, although such teller had been known to receive money in a few instances for such purpose and the bank had not forbidden it.⁶ But where a depositor has overdrawn his account, and upon notice to that effect from the paying teller, with a request to call and make his account good, makes payment for that purpose to the paying teller at the bank, in the absence of the receiving teller, without knowledge that receiving such payment is not within the limits of the paying teller's authority, the bank will be bound by the receipt of the money, as though paid to the proper officer.⁷ The teller of a bank has

¹Lloyd v. West Branch Bank, 15 Penna. St. 172 (1850).

²Boggs v. Lancaster Bank, 7 Watts & S. 331 (1844).

³Pope v. Bank of Albion, 57 N. Y. 126 (1874).

⁴Meads v. Merchants' Bank, 25 N. Y. 145 (1862). And he may bind the bank by a statement that his signature to such certificate was all right, when the signature was a forgery, Continental Nat. Bank v. Nat. Bank of the Commonwealth, 50 N. Y. 575 (1872). But his representation that a check is "good" extends only to funds and signature of drawer and will not bind the bank where the check has been altered by raising the amount, Espy v. Bank of Cincinnati, 18 Wall. 604 (1873).

⁵Farmers' Bank v. Butchers' Bank, 14 N. Y. 623 (1856); affirmed 16 N. Y. 125 (1857).

⁶Thatcher v. Bank of State of New York, 5 Sandf. 121 (1851).

⁷East River Nat. Bank v. Gove, 57 N. Y. 597 (1874).

no authority, however, to bind it by a statement as to the genuineness of an indorsement.¹

The official acts of the *treasurer* of a corporation within the scope of his official duties bind the company in a like manner. Thus, the company will be liable for stock issued by him although fraudulently issued.² But the agent of a company, whose business and authority relate only to the payment of its bills, cannot bind it by giving a promissory note for such payment.³ So, the treasurer of a savings bank has no authority to bind it by indorsing a note in its name.⁴ Where, however, an acceptance of a draft is within the scope of the treasurer's authority, it will bind the company.⁵ And power on his part to indorse for the company may be implied from his acting as general manager.⁶

The *secretary* of a company has not generally power to bind it by contracts;⁷ or to give a draft in its name.⁸ Nor can the general managing agent of a company, it has been held, bind it by a note.⁹ Neither can its business manager.¹⁰ So, the pastor and deacons of a church are not authorized as agents to give a note for the corporation.¹¹

§ 372. **Municipal Officers.**—The power of municipal corporations to execute commercial paper has been already discussed. It remains for us to consider here the authority of its officers to bind it by such paper. Where the power exists, parish officers have no authority to exercise it incident to

¹ Walker v. St. Louis Nat. Bank, 5 Mo. App. 214 (1878).

² Tome v. Parkersburg Branch R. R., 39 Md. 36 (1873).

³ Torry v. Dustin Mont. Association, 5 Allen 327 (1862). But if such is the company's custom and the proceeds were received by it, it will be bound, Foster v. Ohio, &c., Mining Co., 17 Fed. Rep. 130 (1883).

⁴ Brandlee v. Warren Five Cents Savings Bank, 127 Mass. 107 (1879).

⁵ Partridge v. Badger, 25 Barb. 146 (1857).

⁶ Chase v. Hathorn, 61 Me. 505 (1873).

⁷ Chitty 37; Neale v. Turton, 4 Bing. 149.

⁸ First Nat. Bank v. Hogan, 47 Mo. 472 (1871). Nor can he assign a promissory note belonging to the corporation, Blood v. Marcuse, 38 Cal. 590 (1869).

⁹ N. Y. Iron Mine v. Negaunee Bank, 39 Mich. 644 (1878).

¹⁰ Cuiver v. Leovy, 19 La. An. 202 (1867).

¹¹ Jeffs v. York, 10 Cush. 392 (1852); Jeffs v. York, 4 Cush. 371 (1849).

their authority to levy taxes.¹ Neither have township trustees;² nor a board of supervisors;³ nor the selectmen of the town.⁴ So, a township committee, appointed to lay out a highway, cannot bind the town by a note.⁵ So, a county judge cannot bind the county by negotiable bonds given for the building of the county court house.⁶ An auditor for building public works in Washington, D. C., cannot give negotiable certificates of indebtedness to bind the corporation.⁷ But in Indiana the directors of an incorporated school district, it seems, may bind it by giving their note for school purposes.⁸ So, where a note has been given to a township trustee, he may bind the township by an agreement for forbearance or settlement.⁹ It has been held, too, that the elected commissioners of a county are its proper agents to subscribe bonds which have been expressly authorized by statute;¹⁰ and that a note made to a county may be assigned by order of court by the county clerk.¹¹ And where the mayor of a city is designated by a city ordinance to subscribe in its name for railroad stock and execute city bonds in payment, his authority to determine whether the preliminary conditions have been complied with must be presumed from the nature of his agency, so far as regards purchasers.¹²

The ordinary rules of majority and quorum govern the action of corporate bodies. But it has been held in Ohio

¹ *Police Jury v. Britton*, 15 Wall. 566 (1872); *Citizens Bank v. Police Jury of Parish of Concordia*, 28 La. An. 263 (1876). And authority to issue county orders confers no power on the county officers to issue negotiable paper for the county, *People v. Johnson*, 100 Ill. 537 (1881).

² *Inhabitants, &c., v. Weir*, 9 Ind. 224 (1857).

³ *Supervisors of Rensselaer Co. v. Weed*, 35 Barb. 136 (1861).

⁴ *Eaton v. Berlin*, 49 N. H. 219 (1870). But see *Andover v. Grafton*, 7 N. H. 294 (1834), where it was held that the selectmen had such power but that one of them could not bind the town by such a note.

⁵ *Savage v. Rix*, 9 N. H. 263 (1838).

⁶ *Hull v. County of Marshall*, 12 Iowa 142 (1861).

⁷ *Ballard Pavement Co. v. Mandel*, 2 MacArth. 351 (1876).

⁸ *Baker v. Chambles*, 4 G. Greene 428 (1854).

⁹ *Philips v. East*, 16 Ind. 254 (1861).

¹⁰ *Commonwealth, ex rel. Armstrong, v. Commissioners of Allegheny Co.*, 37 Penna. St. 275, 283 (1860).

¹¹ *Gatton v. Dimmitt*, 27 Ill. 400 (1862).

¹² *Commonwealth v. Select Councils of Pittsburgh*, 34 Penna. St. 496 (1859).

that a board of education, which is itself a corporation, cannot in the absence of express authority be bound by the contract of a mere majority of its members.¹

§ 373. **Authority Implied from Blanks.**—As has been already said, where a person executes notes or other negotiable instruments in blank and delivers the paper in that condition, he makes the holder his agent to fill in such blank. And a blank note given by an agent in his principal's name will bind the principal in like manner.² The indorsement of a note in blank is said to be a letter of credit for an indefinite sum, and the giver of such paper will be liable to a *bona fide* holder for whatever sum may be written in the blank.³ If the amount is stated in the margin in figures, it will be sufficient authority to the holder to fill up the bill or note for that amount and for no more.⁴ If such paper is not given for value, the authority, as in other cases of agency, will be revoked by the death of the principal.⁵ But where a blank acceptance is given for value, the blank may be filled in after the acceptor's death.⁶

It has been held that a guaranty may be written by an indorsee over a blank indorsement, if such was the indorser's intention, and that such intention may be shown by parol.⁷ And it has been held that parol evidence is admissible to show that a blank indorsement was given by the indorser to the holder merely as a receipt or voucher on payment of the note by him as the maker's agent.⁸ As to the effect of in-

¹ *Ohio v. Treasurer of Liberty Township*, 22 Ohio St. 144 (1871). In this case, however, the warrant given by it failed for want of a valid consideration.

² *Lambert v. Carroll*, Wright 108 (Ohio 1832).

³ *Cruchley v. Clarence*, 2 M. & S. 90; *Schultz v. Astley*, 2 Bing. N. C. 514.

⁴ *Clute v. Small*, 17 Wend. 238 (1837).

⁵ *Hatch v. Searles*, 2 Sm. & Giff. 147 (1854).

⁶ So held as to drawer's name left blank, *Carter v. White*, L. R. Ch. D. 225 (1882). Under such circumstances, as in the case of an indorsement in blank, the authority to fill the blank is irrevocable, *Cope v. Daniel*, 9 Dana 415.

⁷ *Levi v. Wendell*, 1 Duv. 77 (1863); *Ulen v. Kittredge*, 7 Mass. 233 (1810).

⁸ *Davis v. Morgan*, 64 N. C. 570 (1870); *Andover v. Grafton*, 7 N. H. 298 (1834).

dorsements in blank and the extent of authority implied by them, as also for further consideration of the admissibility of parol evidence to show the intention and meaning of such indorsements, the reader is referred to another part of this work.

§ 374. **Ratification—General Principles.**—If an agent assumed to act as such in executing commercial paper, the subsequent ratification of his act by the principal will be equivalent to an original authority for it.¹ This will apply to the indorsement of a receipt for the payment of interest so as to take the liability of an accommodation indorser out of the statute of limitations.² But a ratification must be made with full knowledge on the principal's part of all circumstances affecting his right in the matter.³ With such knowledge it relates back to the time the paper was executed and requires no new consideration.⁴ And it has been held that where an agent sold goods with a warranty, under an authority originally sufficient but after the expiration of his agency, and took and turned over to his successor a note in payment for the goods, such successor having no authority to give a warranty and having forwarded the note to his principal without informing him by whom the sale had been made, the acceptance of the note by the principal and his attempt to collect it will still amount to a ratification both of the sale and warranty.⁵

The unauthorized act of the agent of a corporation may

¹ Byles 53; Chitty 42; 1 Daniel 295; 1 Parsons 101; *Saunderson v. Griffiths*, 5 B. & C. 909; S. C., D. & Ry. 643; *Ward v. Evans*, Ld. Raym. 930; S. C., 2 Salk. 442; *Vere v. Ashby*, 10 B. & C. 288; *Wilson v. Tummon*, 6 Man. & G. 236; *Ancona v. Marks*, 7 H. & N. 686; *Fenn v. Harrison*, 3 F. R. 757; *Howard v. Baillie*, 2 H. Bl. 618; *Bigelow v. Denison*, 23 Vt. 564 (1851); *Forsythe v. Bonta*, 5 Bush 547 (1869); *Hatch v. Taylor*, 10 N. H. 538 (1840); *Lysle v. Beals*, 27 La. An. 274 (1875). But the person ratified must have acted properly as agent, *Crowder v. Reed*, 80 Ind. 1 (1881).

² *First Nat. Bank v. Ballou*, 49 N. Y. 155 (1872).

³ *Nixon v. Palmer*, 8 N. Y. 398 (1853); *First Nat. Bank v. Gay*, 63 Mo. 33 (1876).

⁴ *First Nat. Bank v. Gay*, 63 Mo. 33 (1876). And it seems that even a forged signature may be ratified without new consideration, *Dow v. Spurney*, 29 Mo. 386; *Greenfield Bank v. Crofts*, 4 Allen 477 (1862).

⁵ *Eadie v. Ashbaugh*, 44 Iowa 519 (1878).

also be ratified.¹ But an act which is *ultra vires* cannot be ratified.² Where, however, the charter of a corporation provides for the exercise of its powers by a board of directors, a transfer of the company's assets by a quorum of five directors (under a by-law declaring that the "ordinary business" of the corporation may be transacted by such quorum) may be ratified by the corporation which has had the benefit of the act, and such ratification will bind the company.³

But after the principal's own power to make a contract has expired, he cannot ratify the previous unauthorized contract of his agent.⁴ Nor does the payment of one bill of exchange imply or involve the ratification of a second.⁵ And it is to be observed that the principal's subsequent ratification of an unauthorized contract will not relieve the agent from the personal liability which he may have incurred by executing it.⁶ It has been said, too, that the doctrine of ratification by a principal cannot be extended to the case of a forgery of his name.⁷

§ 375. **Ratification—What Acts Amount to.**—Where the agent of a corporation gave a draft, of which the proceeds were used for the benefit of the company, its silence as to this draft with previous recognition of similar acts has been construed to amount to a ratification.⁸ Where the agent of a firm had authority to make advances for the purchase of

¹ *Episcopal Charitable Soc. v. Episcopal Church*, 1 Pick. 372 (1823); *Hoyt v. Thompson*, 19 N. Y. 207 (1859). So, too, of a municipal corporation, *Peterson v. Mayor, &c.*, of New York, 17 N. Y. 453 (1858).

² *McCracken v. City of San Francisco*, 16 Cal. 591 (1860); *Zottman v. San Francisco*, 20 *Ib.* 96 (1862).

³ *Hoyt v. Thompson*, 19 N. Y. 207 (1859).

⁴ *Bird v. Brown*, 14 Jur. 132 (1850), where the principal had become a bankrupt before the ratification.

⁵ *Bank of Deer Lodge v. Hope Mining Co.*, 3 Montana 146 (1878).

⁶ *Rossiter v. Rossiter*, 8 Wend. 494 (1832).

⁷ 1 Edwards § 83; *Marks v. King*, N. Y. S. C. 1872, 6 Alb. L. J. 193. But see *Dow v. Spurney*, 29 Mo. 386; *Ferry v. Taylor*, 33 *Ib.* 323 (1863); *Greenfield Bank v. Crofts*, 4 Allen 477 (1862). An acknowledgment by a principal of a forged signature made to save the unauthorized "agent" from prosecution for forgery, will not render the principal liable upon the bill, *Chitty* 338; *Ex parte Edwards*, 5 Jurist 706.

⁸ *Union Mining Co. v. Rocky Mountain Nat. Bank*, 2 Col. 248 (1873), affirming 1 *Ib.* 532.

notes and bills to be remitted to the firm, and his authority had ceased by a change in the firm with notice to him, a bill subsequently purchased by him and sent to the firm will be ratified by their retention and use of it, and a renewal of authority will be implied which will be binding on the new firm.¹ So, the cashier of a bank may bind it by notes executed in its name with the knowledge of the directors; and if the notes were originally unauthorized and the directors appropriate the proceeds and suffer renewals to be made, it will amount to a ratification.² So, if a collecting agent sells without authority a note sent him for collection and gives his own note to the principal for it, the principal's acceptance of such note will amount to a ratification of the sale.³ So, if the principal named as maker in a note makes a part payment of the note, it will be *prima facie* evidence of his authority for its execution.⁴ This is true of a sealed note also executed by an agent under a verbal authority.⁵ So, if the principal, in a letter written by him, speaks of the note as his and promises to pay it, this will be a ratification.⁶

And it has been held that where a son bought goods and directed that they should be charged to his father, and the father, when afterwards informed of it, said it was all right and he would pay for them, this was a ratification of the son's act.⁷ This is true also of similar actions on the principal's part in relation to a note executed in his name "Per Proc. A. B."⁸ So, if the principal receive and retain the proceeds of a note made in his name, and acquiesce in the act when made known to him until the note has been protested, he

¹ Callanan v. Van Vleck, 36 Barb. 324 (1862).

² Ballston Spa Bank v. Marine Bank, 16 Wis. 120 (1862).

³ Cushman v. Loker, 2 Mass. 106 (1806); Turner v. Wilcox, 54 Ga. 593 (1875).

⁴ Walter v. Trustees of Schools, 12 Ill. 63 (1850).

⁵ Bates v. Best, 13 B. Mon. 215 (1852).

⁶ Bigelow v. Denison, 23 Vt. 564 (1851).

⁷ Booker v. Tally, 2 Humph. 308 (1841).

⁸ Harper v. Devane, 10 La. An. 724 (1855). In this case the principal also corrected the date of the note.

will be held to have ratified it and will be liable on it.¹ So, if the agent of a corporation buys property and gives a note for it in the company's name, the company will ratify the note by taking possession of the property.² And if, on the other hand, an agent takes a note without authority, and the principal accepts it with knowledge of the circumstances, he will be bound.³ So, if a committee of a common council has without authority caused architects' plans and drawings to be prepared for erecting a market, a subsequent resolution of the common council adopting the plans and directing the building to be carried on according to them, will be a ratification.⁴ And it has been held that where one part owner of a vessel insures it without previous authority for all the owners, they may ratify his act even after they obtain knowledge of the loss of the vessel. And their bringing an action upon the policy is such a ratification.⁵

§ 376. **Ratification—By Acquiescence.**—A ratification may also be implied from the silence of the principal after becoming acquainted with the facts. Thus, if the agent receives and indorses a note in his principal's name for goods sold or money due to his principal, and the principal fails to disclaim it and retains the proceeds, although he knew of the matter seventeen days before the maturity of the note, when, too, the maker was in failing circumstances, he will be held to have ratified the taking and indorsing of the note.⁶ So, where an agent, without original authority to give a note for

¹*Nat. Bank of Orleans v. Fassett*, 42 Vt. 432 (1869). But not a mere promise to pay, with no acknowledgment of the act as his, *Owsley v. Phillips*, 78 Ky. 517 (1880).

²*Moss v. Rossie Lead Mining Co.*, 5 Hill 137 (1843). So, too, *Gilbert v. Dent*, 46 Ga. 238 (1872); *Warden v. Pattee*, 57 Iowa 515 (1881).

³*Farrar v. Peterson*, 52 Iowa 420 (1879).

⁴*Peterson v. The Mayor, &c., of New York*, 17 N. Y. 453 (1858).

⁵*Finney v. Fairhaven Ins. Co.*, 5 Metc. 192 (1842). So, proof of a claim in bankruptcy against the maker of a note by one as indorser, whose name has been indorsed by an agent without his authority, will be a ratification of the agent's indorsement, *Harrod v. McDaniels*, 126 Mass. 413 (1879).

⁶*Nat. Bank of Orleans v. Fassett*, 42 Vt. 432 (1869). So, two years' silence after knowledge by the bank officers that a check had been given in its name by the cashier without authority amounts to evidence of ratification by the bank, *De Land v. Nat. Bank*, 20 Cent. L. J. 196 (Ill. Sup. Ct. 1884).

his principal, has renewed it with the principal's knowledge and without dissent on his part, it will amount to an original authority for the note.¹ So, if the principal knows of the agent's receiving money without authority on a note left in his possession, and remains silent afterwards for nearly three years, leaving the money in the meanwhile in the agent's hands, his authority will be implied for other subsequent payments made to the agent on the note.² So, if the principal has indorsed a check in blank, and given it to his agent, who has raised the amount and filled the instrument up as a bill of exchange, it has been held that the principal's failure to object to the alteration when the bill was presented to him for payment amounted to a ratification.³ But in an older case in Massachusetts, where bank notes had been stolen after being signed by the cashier and the president's signature upon them had been forged, the action of the directors in refusing payment of the notes and returning them without any statement that they were counterfeit, was held not to amount to ratification on their part.⁴

§ 377. **Termination of Agency.**—The authority of an agent once conferred continues until it has been revoked and notice of that fact duly given.⁵ If the authority has been revoked without giving notice of the fact, a bill of exchange drawn under it afterwards will bind the principal.⁶ This rule applies to the authority of a servant, which ends only when the determination of the relation, to which it was incident, has been made generally known.⁷ But a special agency expressly given for a limited time will end with the limitation.⁸ So, where the charter of a bank expires at a fixed time, and the

¹Whiting v. Western Stage Co., 20 Iowa 255 (1866).

²Wardrop v. Dunlop, 1 Hun 325 (1874).

³Ward v. Williams, 26 Ill. 447 (1861).

⁴Salem Bank v. Gloucester Bank, 17 Mass. 29 (1820).

⁵Byles 59; Chitty 42; 1 Daniel 271; Newsome v. Coles, 2 Campb. 617.

⁶Caldwell v. Neil, 21 La. An. 342 (1869).

⁷Anonymous v. Harrison, 12 Mod. 346; Nickson v. Broham, 15 Ib. 110; Monk v. Clayton, Molloy 282.

⁸Manufacturers' Bank v. Barnes, 65 Ill. 69 (1872).

cashier appointed before that time holds over after an extension of the charter, his authority, so far as regards the liability of his original bondsmen, has been held to end with the expiration of the original charter.¹

As has been said, an indorsement of a note for collection will amount to a power of attorney to collect it; but such power will be revoked by a subsequent transfer of the note by the principal.² So, too, in general, death operates as a termination of all agencies. But where an agent has been directed by his principal to obtain securities on a note and to hand them over with the note to a creditor of the principal, this amounts in equity to a transfer of the note and may be perfected, it has been held, by an actual delivery by the agent after the principal's death.³ The authority of an agent, as has been seen, will also be suspended and in some cases terminated by the outbreak of a war making the principal and agent alien enemies. For the consideration of this subject the reader is referred to an earlier part of this work.⁴

¹*Union Bank v. Ridgely*, 1 Harr. & G. 324, 431 (1827). But not with the year for which he was originally elected, *Ib.*

²*Atkins v. Cobb*, 56 Ga. 86 (1876).

³*Nicolet v. Pillot*, 24 Wend. 240 (1840). So, where a note was delivered to an agent to be delivered by him to the payee after his principal's death, such delivery after the maker's death has been held to be sufficient, *Giddings v. Giddings*, 51 Vt. 227 (1878).

⁴See Chap. VIII. § 248 *et seq.*

II. LIABILITY OF AGENT.

378. Individual Liability of Agent.

379. not Confined to Instrument.

380. how Avoided.

381. Public Officers not Liable.

382. Agent's Liability to Principal—Drawer to Drawee.

383. to Payee.

384. Indorser to Indorsee.

385. Negligence or Fraud.

§ 378. **Individual Liability of Agent.**—Where an agent signs commercial paper in his principal's name and by his authority, the principal will be liable with or without subsequent ratification.¹ Sometimes the agent may bind his principal by his indorsement so far as to effect a good transfer, although the act may not be binding as an indorsement upon the principal.² If an agent, known to be such and authorized to make a contract, makes a contract for a corporation which is *ultra vires*, he will not thereby become personally liable.³ But if he makes a contract without authority, he will become personally liable in many cases *ex contractu*.⁴ So, if he exceeds the authority given him.⁵ And in such case he may be held liable for the whole amount due on the contract.⁶ And where an agent has accepted a bill of exchange without authority, he will be liable not only to the original payee or holder, but to subsequent indorsees.⁷ In order, however, to hold an agent personally liable for exe-

¹ *Rossiter v. Rossiter*, 8 Wend. 494 (1832).

² *Brown v. Donnell*, 49 Me. 421 (1860).

³ *Hall v. Lauderdale*, 46 N. Y. 75 (1871).

⁴ Byles 64; Chitty 47; 1 Edwards 285; 1 Parsons 105; *Lewis v. Nicholson*, 18 Q. B. 509; *Randall v. Trimen*, 18 C. B. 786; *Collen v. Wright*, 7 El. & Bl. 301; S. C., 8 *Ib.* 647; *Kelner v. Baxter*, 36 L. J. C. P. 94; *Scott v. Lord Ebury*, *Ib.* 151. And this is so in Louisiana, when the agent has exceeded his powers and not disclosed his principal. *Barry v. Pike*, 21 La. An. 221 (1869); *Clay v. Oakley*, 5 Mart. (n. s.) 137 (1826).

⁵ *Roberts v. Button*, 14 Vt. 195 (1842).

⁶ *Feeter v. Heath*, 11 Wend. 479 (1833); *Hampton v. Speckenagle*, 9 Serg. & R. 212 (1823); *Meech v. Smith*, 7 Wend. 315 (1831); *White v. Skinner*, 13 Johns. 307 (1816).

⁷ *Polhill v. Walter*, 3 B. & Ad. 114.

cuting a paper without authority, his want of authority must be made to appear affirmatively.¹

§ 379. **Liability Not Confined to the Instrument.**—Where an agent has executed a sealed note for his principal under a verbal authority, it has been held that neither he nor the principal will be bound *by the note*, but the agent may be held liable in a separate action on the case.² So, directors of a corporation, not forming the majority required by charter in order to bind the company, may become liable individually to a bank which has advanced money on checks of the company's agent on the strength of representations made by such directors as to the agent's authority.³ So, where two directors borrowed money for the company without authority, on a memorandum of deposit, they were held to be liable in an action for breach of warranty of authority.⁴

§ 380. **Personal Liability—How Avoided.**—But if an agent is known to be such, *e. g.*, if the master of a vessel draws a bill as such for supplies for the vessel on account of the agents and consignees, he will not be individually liable.⁵ On the other hand, if an agent contracts personally, he will be personally liable, although the agency be known and the principal disclosed.⁶ And it has been held that merely describing themselves as agents in such a contract will not relieve them from individual liability.⁷

To avoid personal liability an agent should either sign his principal's name or expressly state his own ministerial character.⁸ But it has been held, under special circumstances,

¹ *Wilson v. Barthrop*, 2 M. & W. 863.

² *Delius v. Cawthorn*, 2 Dev. 90 (1829). And see, as to liability of director accepting a bill in excess of his authority, *West London, &c., Bank v. Kitson*, L. R. 12 Q. B. D. 157 (1884).

³ *Cherry v. Colonial Bank of Australia*, L. R. 3 P. C. 24 (1869). And see *Ducarry v. Gill*, 4 C. & P. 121.

⁴ *Richardson v. Williamson*, L. R. 6 Q. B. 276 (1871). See, too, *Weeks v. Propert*, L. R. 8 C. P. 427 (1873).

⁵ *Lincoln v. Smith*, 11 La. 11 (1837).

⁶ *Andrews v. Allen*, 4 Harring. 452 (Del. 1847).

⁷ *Rollins v. Phelps*, 5 Minn. 463 (1861), especially where only a part of the whole number of agents designated joined in signing the paper.

⁸ *Leadbitter v. Farrow*, 5 M. & S. 345; *Sowerby v. Butcher*, 2 Car. & M. 368; S. C., 4 Tyrw. 320.

that he may become liable individually upon a note or bill executed without authority in his principal's name.¹ And this has been held upon the theory that the agent, using another's name as maker of a note without his authority, really intended to bind himself and had used an assumed name for that purpose.² So, it has been held that if an agent without authority signs a note as "A. B., attorney for C. D.," he will be personally liable.³ The rule is, however, not to be extended beyond cases where the agent uses apt words to charge himself. In other cases he will not be liable on a contract executed in his principal's name.⁴

Where an agent has procured a policy insuring "A. for B., to be insured in ship G.," and gives his individual note for it without any intention of agency, and charges it to his principal, and the company subsequently proves its claim for premiums against the bankrupt estate of the agent and receives a dividend from it, it cannot afterwards betake itself to the principal for payment of the balance due.⁵ So, where an agent, authorized to borrow money and draw bills of exchange on his principal, gives instead a bond under seal purporting to bind himself and his principal, the principal cannot be held in an action of assumpsit by the obligee of the bond.⁶

If an agent signs his principal's name, adopting and using it at the time as his own, he will become individually liable.⁷

¹So held on proof of agent's want of good faith, *Wilson v. Barthrop*, 2 M. & W. 863. So, where a bill was drawn upon the agent of a joint stock company and accepted by him "per procuration" without authority, the agent, being also a member of the company, was held liable as such, *Nichols v. Diamond*, 9 Exch. 154. So, too, in Louisiana, where the agent without authority gave a note in the name of a firm after its dissolution, *Dodd v. Bishop*, 30 La. An. 1178 (1878).

²*Grafton Bank v. Flanders*, 4 N. H. 239 (1827).

³*Byars v. Doores*, 20 Mo. 284 (1835).

⁴*Chitty* 48; *Hall v. Crandall*, 29 Cal. 567 (1866); *Long v. Colburn*, 11 Mass. 97; *Ballou v. Talbot*, 16 *Ib.* 461; *Abbey v. Chase*, 6 Cush. 54; *Woodes v. Dennett*, 9 N. H. 55 (1837); *Blanchard v. Kaull*, 44 Cal. 440 (1872). See, too, *White v. Madison*, 26 N. Y. 117 (1862).

⁵*Bedford Com. Ins. Co. v. Covell*, 8 Metc. 442 (1844).

⁶*Banorgoe v. Hovey*, 5 Mass. 11 (1809).

⁷*Baker v. Deming*, 8 Ad. & El. 94; *Kelner v. Baxter*, L. R. 2 C. P. 174

But if he gives a note in the principal's name, signing it as agent, he will not be.¹ If without authority he signs the name of another as acceptor to a bill of exchange without any fraudulent intent, this will be a fraud in law, for which he will be individually liable in an action even to subsequent indorsees of the bill.² So, where the trustees of a company give a note without authority, describing themselves as such both in the body of the instrument and in their signatures, they will still be liable individually.³ The proper mode of executing commercial paper by an agent and the liability of parties, as affected by the mode of execution, are more fully considered in an earlier part of this work treating of the form of the instrument.

Where an agent has given a note or bill without authority in his principal's name, his liability must be confined to such damages as are proved.⁴ And he will not be liable for a failure of authority due to the death of his principal without his knowledge.⁵

§ 381. **Public Officers not Liable.**—A government officer, as has been already said, will not be individually liable on a draft or bill of exchange given by him as such officer.⁶

(1866); *Jewett v. Whalen*, 11 Wis. 124 (1860); *Rodgers v. Coit*, 6 Hill 322; *Brown v. Butchers, &c., Bank*, *Ib.* 443; *Merchants' Bank v. Spicer*, 6 Wend. 443.

¹ *Jefts v. York*, 4 Cush. 371 (1849); S. C., 10 *Ib.* 392; *Moor v. Wilson*, 26 N. H. 332 (1853).

² *Polhill v. Walter*, 3 B. & Ad. 114.

³ *McClure v. Bennett*, 1 Blackf. 189 (1822).

⁴ *Eastwood v. Bain*, 3 Hurlst. & N. 738 (1858).

⁵ *Smout v. Ilberry*, 10 M. & W. 1. Nor in such case are the representatives of the deceased principal liable, *Blades v. Free*, 9 B. & C. 167.

⁶ *Chitty* 44; 1 *Daniel* 365; 1 *Parsons* 122; *Story on Prom. Notes* § 75 *n.*; *Macbeth v. Haldimand*, 1 T. R. 172; *Unwin v. Wolseley*, *Ib.* 674; *Myrtle v. Beaver*, 1 East 135; *Rice v. Chute*, *Ib.* 579; *Allen v. Waldegrave*, 2 Moore 627; *Gidley v. Palmerstone*, 7 *Ib.* 91; S. C., 2 *Brod. & Bing.* 275; *Prosser v. Allen*, *Gow.* 117; *Brown v. Austin*, 1 *Mass.* 208 (1804); *Freeman v. Otis*, 9 *Ib.* 272 (1812); *Dawes v. Jackson*, *Ib.* 490 (1813); *Walker v. Swartwout*, 12 *Johns.* 444 (1815); *Olney v. Wickes*, 18 *Ib.* 122 (1820); *Osborne v. Kerr*, 12 *Wend.* 179 (1834); *Fox v. Drake*, 8 *Cow.* 191 (1828); *Nichols v. Moody*, 22 *Barb.* 611 (1856); *Hodgson v. Dexter*, 1 *Cranch* 345; *Bank of Kentucky v. Sanders*, 3 A. K. Marsh. 184 (1820); *Jones v. Le Tombe*, 3 *Dall.* 384 (1798). But it would be otherwise if there was an intention on the officer's part to make himself individually liable, *Perry v. Hyde*, 10 *Conn.* 330 (1834); or if he was guilty of fraud, or by his act prevented a recovery from the government, *Freeman v. Otis*, 9 *Mass.* 272 (1812). And mere want of authority

Nor can he maintain an action in his own name on such a paper made to him in his official capacity.¹ And it has been held that a note, made to the town treasurer by name "or his successors in office," could not be sued upon by the town.² The exemption of public officers from personal liability on their contracts has been held to extend to school trustees,³ sheriffs,⁴ tax and revenue collectors,⁵ building committees,⁶ superintendents of public institutions,⁷ municipal officers,⁸ army and navy officers,⁹ cabinet officers,¹⁰ and foreign consuls.¹¹

§ 382. **Drawer—Agent of Drawee.**—The liability of the agent *to the principal* is next to be considered. Where the agent draws a bill of exchange on his principal by his authority, the principal is not, in general, liable as drawer.¹² Nor is it necessary in such case that the agency of the drawer should be expressed on the face of the bill, if it is drawn in fact for a debt of the principal.¹³ Where the drawer of a bill is the agent of the drawee, it is held in England that he is liable both to the payee and subsequent parties, although known by them to be acting as agent merely.¹⁴ In the United States a different rule seems to have been laid down, and

for the contract has been held sufficient to charge him personally in New Hampshire, *Savage v. Rix*, 9 N. H. 263 (1838).

¹ *Irish v. Webster*, 5 Me. 171 (1827); *State v. Boies*, 11 Me. 474 (1834).

² *Arlington v. Hines*, 1 D. Chip. 431.

³ *Tutt v. Hobbs*, 17 Mo. 486 (1853); *Syme v. Butler*, 1 Call 105 (1797).

⁴ *Enloe v. Hall*, 1 Humph. 303 (1839).

⁵ *Nichols v. Moody*, 22 Barb. 611 (1856).

⁶ *Fox v. Drake*, 8 Cow. 191 (1828); *Damerson v. Irwin*, 8 Ired. 421 (1848); *Tucker v. The Justices*, 13 *Id.* 434 (1852). But see *Simonds v. Heard*, 23 Pick. 120 (1839).

⁷ *Osborne v. Kerr*, 12 Wend. 179; *Dawes v. Jackson*, 9 Mass. 490.

⁸ *Randall v. Van Vechten*, 19 Johns. 60 (1821); *Olney v. Wickes*, 18 *Id.* 122. But see, for individual liability of such officers growing out of form of signature, *Underhill v. Gibson*, 2 N. H. 352 (1821); *Hall v. Cockrell*, 28 Ala. 507 (1856).

⁹ *Walker v. Swartwout*, 12 Johns. 444; *Symes v. Butler*, Call 105 (1796).

¹⁰ *Hodgson v. Dexter*, 1 Cranch 345.

¹¹ *Jones v. Le Tombe*, 3 Dall. 384.

¹² *Ducarry v. Gill*, 4 C. & P. 121.

¹³ *Wolfe v. Jewett*, 10 La. 383 (1836).

¹⁴ *Leadbitter v. Farrow*, 5 M. & S. 345 (1816).

it has been held that the agent who draws a bill on his principal for goods sold him, disclosing the principal, is not liable to a payee who has knowledge of the agency.¹ But if the agent draws the bill on his principal in his individual name, he will be liable as drawer to the payee and subsequent parties,² even though the bill is drawn expressly chargeable to the principal's account and though the payee knows of the agency.³

§ 383. **Drawer or Maker—Agent of Payee.**—Where the drawer of a bill is the payee's agent, as in the case of a bill drawn on the purchaser of goods for payment, the agent is individually liable to the payee by the English rule.⁴ But in the United States again a different rule has been laid down.⁵ And where the maker of a note, as agent for the payee, uses a fictitious name for the purpose of raising money for the payee, he has been held in a recent case not to be individually liable even to a *bona fide* holder for value.⁶

§ 384. **Indorser—Agent of Indorsee.**—Where the agent acts as indorser of a bill or note in transferring it to his principal, he makes himself liable in England as indorser, unless he expressly restricts the liability.⁷ But he would not be liable on such indorsement to his principal, if it were made merely for the purpose of a remittance and by the principal's own order.⁸ If the agent purchases a draft for his principal

¹ Daniel 290; 1 Parsons 94; *Roberts v. Austin*, 5 Whart. 313 (1840), reversing 2 Miles 254 (1838).

² *Newhall v. Dunlap*, 14 Me. 180 (1837).

³ *Mayhew v. Prince*, 11 Mass. 54 (1814).

⁴ Chitty 46; 1 Daniel 292; 1 Parsons 103; *Le Fevre v. Lloyd*, 5 Taunt. 749; S. C., 1 Marsh. 318; *Sowerby v. Butcher*, 2 C. & M. 368; S. C., 4 Tyrw. 320.

⁵ *Jones v. Lathrop*, 44 Ga. 398 (1871); *Mechanics' Bank v. Earp*, 4 Rawle 390 (1834).

⁶ *Bartlett v. Tucker*, 104 Mass. 336 (1870). In this case the note was purchased on the payee's credit, the actual maker being neither known nor credited by the purchaser.

⁷ Chitty 46; 1 Daniel 293; 1 Parsons 104; *Goupy v. Harden*, 7 Taunt. 159; S. C., 2 Marsh. 454.

⁸ Chitty 49; 1 Daniel 293; *Warwick v. Noakes*, Peake 68; *Kimmell v. Bittner*, 62 Penna. St. 203 (1869). See, too, *Lewis v. Brehme*, 33 Md. 431 (1870). And an action by the principal's indorsee against the agent on such an indorsement was restrained by injunction in a case where the bill had been made payable to the agent accidentally, the plaintiff being

by his direction, and remits it by indorsement, the draft being that of a drawer in good credit at the time, he will not be liable to his principal as an indorser.¹ But if he is directed to make remittance by bill on a "good house," and the house drawn upon proves otherwise, he will be liable to the principal.²

In general, to render an agent liable as a guarantor to his principal of paper so indorsed by him, consideration for such liability is necessary, as well as an express undertaking on the agent's part.³ Agents under a *del credere* commission are, however, liable on their indorsement to their principal, it being a part of the business intrusted to them.⁴ And such agents are liable for loss on a bill of exchange remitted by them to a member of their firm who had made advances, in repayment of such advances, and dishonored while in his hands.⁵ If an agent indorses to his principal for accommodation merely, he will not be liable to the principal, following the usual rule as to accommodation paper.⁶

§ 385. **Agent's Liability for Negligence or Fraud.**—The liability of an agent to his principal for negligence or fraud in the performance of his duty will be considered more fully elsewhere, and is treated of more extensively in special works upon the subject of agency. If an agent, employed to obtain a discount for his principal, misapplies the proceeds, he will be liable to the principal for damages.⁷ Instead of a special action on the case against the agent for breach of his duty as such, the principal may sue him in such case for money had

cognizant of that fact, *Kidson v. Dilworth*, 5 Price 564. And an agent remitting a bill by mail will not be liable for its loss, where it was stolen and paid to a stranger, *Warwick v. Noakes*, Peake 68. And this would have been the case, it seems, even without express directions, it being in the ordinary course of business, *Ib.*, per Lord Kenyon.

¹ *Byers v. Harris*, 9 Heisk. 652 (1872).

² *Leverick v. Meigs*, 1 Cow. 645 (1824).

³ *Sharp v. Emmet*, 5 Whart. 288 (1839).

⁴ Chitty 46; 1 Daniel 293; 1 Parsons 105; *Mackenzie v. Scott*, 6 Bro. P. C. 280; *Lewis v. Brehme*, 33 Md. 43 (1870).

⁵ *Lucas v. Groning*, 1 Stark. 391.

⁶ Chitty 46; 1 Daniel 293; 1 Parsons 104; *Ex parte Robinson*, Buck 113.

⁷ *Wolf v. Brower*, 5 Robt. 601 (1866).

and received.¹ This is the proper form of action to be employed, and he cannot bring trover for the bill which has been misapplied.² In like manner, if a municipal officer has obtained money on a note issued by him without authority in the name of the town, a recovery of the money received may be had against him by the town, and the illegality of the note will be no defense.³

It is a well established principle of law that an agent cannot make a profit in his principal's business at the principal's expense, and that all profits made by him from dealing with his principal's property and in his business belong to the principal.⁴ Thus, parties whose interests are adverse to one another cannot well stand in the relation of principal and agent in the same business. For instance, the holder of a note cannot be the maker's agent for the purpose of taking it out of the statute of limitations by indorsing on it a new promise of payment.⁵ So, a corporation cannot give a valid note to its acting trustees.⁶ Although it has been held that a municipal corporation may lawfully take and sue upon a note made by a defaulting city treasurer for the money taken by him.⁷

¹ *Thorpe v. Thorpe*, 3 B. & Ad. 580.

² *Palmer v. Jarman*, 2 M. & W. 282.

³ *Holderness v. Baker*, 44 N. H. 414 (1862).

⁴ *Diplock v. Blackburn*, 3 Campb. 43; *Thompson v. Havelock*, 1 Campb. 327.

⁵ *Wright v. Bessman*, 55 Ga. 187 (1875). The payee of a note may, however, act as agent for the maker in signing it in his presence and at his request, *Haven v. Hobbs*, 1 Vt. 238 (1828).

⁶ *Wilbur v. Lynde*, 49 Cal. 290 (1874). And see, as to the question of a treasurer borrowing city funds in his hands as such, and giving his note to the city, *Greening v. Patten*, 51 Wis. 146 (1881).

⁷ *City of Buffalo v. Bettinger*, 76 N. Y. 393 (1879).

III. DEFENSES.

- 386. Defense—Want of Authority.
- 387. When Admissible.
- 388. Notice of Limit of Authority.
- 389. Municipal Warrants.
- 390. When Inadmissible—*Bona fide* Holder.
- 391. Commercial Paper Payable to Bearer.
- 392. Principal Estopped by Conduct.
- 393. Evidence—Burden of Proof.

§ 386. **Want of Authority—As a Defense.**—Where the owner's title to a bill or note is bad, as, for instance, in case of forged or stolen paper, such defect will also affect the title of any agent to whom it is transferred.¹

Where the agent himself has no authority to sign a bill or note for his principal, the signature will amount to a forgery, on which the principal will not be liable even to a *bona fide* holder for value.² And where the principal has limited the authority given his agent, he will not be liable if the authority is exceeded.³ Thus, if an agent be authorized to indorse certain notes for his principal in their joint name, they not being partners, a holder, who knew nothing of this authority, cannot recover against the principal on another note executed in that manner, but in excess of the express authority given, although the holder be a *bona fide* purchaser for value.⁴ This is still more clearly the case where the instrument carries notice of the limit of authority on its face, *e. g.* where the selectman of the town was authorized to give notes for bounty payable to recruits when mustered into the United States service, and the notes bore the words "value received in government military service," but the payee, though enlisted, was never mustered into the service.⁵ But where power was given by the directors of a company to their chairman to accept bills

¹ Byles 259; Chitty 292; *Solomons v. Bank of England*, 13 East 135; S. C., 1 Rose 99; *De la Chaumette v. Bank of England*, 9 B. & C. 208.

² 1 Edwards § 83; 1 Parsons 119; *Lander v. Castro*, 43 Cal. 497 (1872).

³ *Fenn v. Harrison*, 3 T. R. 757; *East India Co. v. Hensley*, 1 Esp. 111.

⁴ *Hotchkiss v. English*, 4 Hun 369 (1875).

⁵ *Ladd v. Town of Franklin*, 37 Conn. 53 (1870).

drawn on it by A., on his depositing securities to a certain amount, a *bona fide* holder of the acceptances was held not to be affected by the fact that this condition as to deposit of securities was only partially complied with, the restriction being in a measure a secret one and the directors being estopped by their action from setting it up.¹

Where an agent purports to sign a note for several principals, some of whom have given him no authority to do so, the others who have authorized him will still be bound.² If an agent has indorsed a bill payable to order without any authority he alone will be liable to an action.³ Such defense is, however, a personal privilege, and it has been held that a surety signing a promissory note cannot set up in his own defense that the principal's name was signed without authority.⁴

Where notes are given to an agent in settlement of losses which he falsely represented himself to have incurred in the maker's business, it will be no defense to the maker, that the notes were given without knowledge that his instructions had

¹*In re Land Credit Co. of Ireland*, L. R. 4 Ch. App. 460 (1869). Giffard, L. J., says in this case, p. 473: "Under resolutions such as these, if there is an acceptance *modo et forma*, and by the persons pointed out by the resolutions, it is not to be deemed incumbent even on persons who have notice of the resolutions to inquire whether the particular consideration mentioned in them was received. The fact of the person who is the agent accepting and parting with the acceptance is in point of fact an assurance by that person that he has done all that is required to be done by him on behalf of the company who employed him—an assurance on which the person who deals with the company not only may safely rely, but must of necessity rely, otherwise the business of companies of this description could never be carried on. * * * I think it is quite enough to put the case simply upon this: that the acceptance of the bills was a transaction plainly within the powers of the company, that it was a transaction plainly within the powers of the board of directors, that the fact that these bills were accepted and handed over *was perfectly well known to the board of directors*, and that whether it was assented to by them with or without knowledge as to the securities which were taken is, in my opinion, quite immaterial. There was, at all events, a representation to the public by the agents of the company, who were instructed to carry out this transaction, that everything was rightly done; and I am of opinion that it does not lie in the mouth of the company to assert that what was so represented to be rightly done was not carried out according to the precise terms specified in that which, if in point of fact it was a limitation of authority at all, was not a limitation of authority intended to be communicated to the public or to have any effect as between the company and the public."

²*Taylor v. Jones*, 1 Ind. 17 (1848).

³*Fearn v. Filica*, 7 Man. & G. 513.

⁴*Weare v. Sawyer*, 44 N. H. 198 (1862).

been disobeyed by the agent. But fraudulent representations on the agent's part as to the transactions, inducing the principal to give the notes, will be a good defense, the notes being to that extent without consideration.¹

§ 387. **Defenses — When Admissible.**—Where bills and notes are negotiated by an agent without authority after they are due, they are subject to the defense of want of authority, and the principal may have an action for the refunding of the money obtained on them.² But where a bill is payable to the drawer's order and indorsed by him to his agent after its maturity for the purpose of taking up his own outstanding acceptances, and is misapplied by the agent, this will constitute no defense against a *bona fide* holder.³

On the other hand, where a bill is indorsed to an agent for the purpose of procuring a discount before its maturity, and is misapplied by the agent, this will constitute a good defense at suit of a holder before maturity for usurious consideration.⁴ But where an agent obtains a loan for his principal on usurious terms without his knowledge, the usury will not be presumed to have been authorized by the principal.⁵ Where an agent, without disclosing his principal, has purchased a note from the maker at a usurious rate, such excess of lawful interest may be recovered by the maker from the payee.⁶ And where A. sells a bill of exchange for B., who has held it as agent and misappropriated it, and pays over to B. only a part of the proceeds, he is not entitled to the immunity of a *bona fide* holder for value and is subject to defense on the owner's part arising out of the misappropriation, although the agent, A., had represented the bill to be his own property.⁷

¹Beall v. January, 62 Mo. 434 (1876).

²Lee v. Zagury, 8 Taunt. 114.

³Wright v. Hay, 2 Stark. 398.

⁴Keutgen v. Parks, 2 Sandf. 60 (1848).

⁵Rogers v. Buckingham, 33 Conn. 81 (1865).

⁶Culver v. Bigelow, 43 Vt. 249 (1870).

⁷Bastable v. Pool, 1 Cromp. M. & R. 410; S. C., 5 Tyrw. 111.

If the holder of a bill takes it with knowledge that it was given without authority of the principal, he will take it subject to such defense.¹ And if a bill has been received by an agent for a particular purpose, and discounted by him in disregard of that purpose, neither he nor a third person purchasing it with knowledge of the circumstances can hold the proceeds or use them as a set-off against the real owner.² But the mere fact that the person selling the note to the plaintiff was a broker is not sufficient to charge him with notice, or subject him to such a defense on the part of an owner, who has been defrauded by the agent's sale of the note for his own benefit.³

Where a principal has given his agent authority to accept bills in his name, he cannot escape liability by setting up his own want of interest in the particular transaction or the want of consideration to him, unless he shows that the holder had knowledge of the agent's abuse of his authority.⁴

§ 388. **Notice of Limit of Agent's Authority.**—If the agency of the party is made to appear, the principal will not be bound beyond the authority given.⁵ And where the holder has notice that the party acting as agent is such, he is bound to inquire into his authority.⁶ Where the authority is expressly conferred in writing, and is exceeded by the agent, the principal will not be liable.⁷ And authority appearing by the use of such words as "per procuration" is such notice of agency as will put the holder on inquiry.⁸ But it seems that the addition to the indorser's name of the

¹ Byles 58; *Attwood v. Munnings*, 7 B. & C. 278; S. C., 1 Man. & Ry. 78.

² *Ex parte Frere*, Mont. & MacA. 263; *Kay v. Flint*, 8 Taunt. 21; *Ex parte Flint*, 1 Swanst. 30.

³ *Atlas Nat. Bank v. Savery*, 127 Mass. 75 (1879).

⁴ *Broadway Savings Bank v. Vorster*, 30 La. An. 587 (1878).

⁵ *Chitty* 37; 1 *Daniel* 265.

⁶ *Chitty* 37; *Attwood v. Munnings*, 7 B. & C. 278; *East India Co. v. Tritton*, 3 *Ib.* 280.

⁷ *Beach v. Vandewater*, 1 Sandf. 265 (1848). In this case authority was given to accept drafts to be drawn against goods purchased, the agent "having evidence in his possession of such purchases."

⁸ Byles 56; *Alexander v. McKenzie*, 6 C. B. 766; *Attwood v. Munnings*, *supra*; *Stagg v. Elliott*, 12 C. B. (N. S.) 373.

word "curator," will not amount to such notice.¹ Where an agent is authorized to accept a bill for his principal, the holder may demand the production of the authority.² Where an indorsement contains such words as "for my use," or "within must be credited to A. B.," this shows a limited agency in the indorsee and will prevent a transfer by him free from defense.³ And in such case a bill transferred by the agent as security for advances made to him may be recovered in trover by the principal.⁴

§ 389. **Municipal Warrants—Defense Admissible.**—As we have already seen, municipal warrants drawn by one town officer on another are not, properly speaking, negotiable. Such instruments are, therefore, liable even at suit of a *bona fide* holder to the defense of being issued without authority.⁵ And this is true although they are made payable to bearer;⁶ and especially where they are made payable out of some particular fund, specifying a road tax or other public fund.⁷

§ 390. **Defenses—When Inadmissible—Bona Fide Holder.**—Where a note or bill payable to bearer has been delivered by an agent without authority from his principal, and has come into the hands of a *bona fide* holder for value before maturity, it will be good against all parties notwithstanding the agent's want of authority.⁸ So, if notes have been put in the hands of an agent to obtain discounts for his principal, and have been transferred by his indorsement and the proceeds misapplied by him, the principal cannot recover them from a *bona fide* holder for value.⁹ So, where notes are indorsed

¹ *Paulette v. Brown*, 40 Mo. 52 (1867).

² *Byles* 59; 1 *Parsons* 120; *Attwood v. Munnings*, 7 B. & C. 278; S. C., 1 M. & Ry. 78.

³ *Treuttel v. Barandon*, 8 Taunt. 100; *Sigourney v. Lloyd*, 8 B. & C. 622, 3 M. & Ry. 58.

⁴ *Treuttel v. Barandon*, 8 Taunt. 100.

⁵ *Sturtevant v. Inhabitants of Liberty*, 46 Me. 457 (1859); *People v. Supervisors of El Dorado*, 11 Cal. 171 (1858).

⁶ *Smith v. Inhabitants of Cheshire*, 13 Gray 318 (1859).

⁷ *Dyer v. Covington Township*, 19 Penna. St. 200 (1852).

⁸ *Byles* 58; *Miller v. Race*, 1 Burr. 452; *Lawson v. Weston*, 4 Esp. 56; *Raphael v. Bank of England*, 17 C. B. 161; *Bird v. Daggett*, 97 Mass. 494 (1867).

⁹ *Ogden v. Marchand*, 29 La. An. 61 (1877).

in blank to an agent for a particular purpose, which has been disregarded by him, the principal will be bound to a *bona fide* holder by reason of the general authority implied in the blank, and cannot, against such holder, avail himself of the fact that the agent has exceeded his authority.¹ And it makes no difference in such case that the agent has been guilty of a fraud upon his principal.² Such fraud will not make the indorsement a forgery.³

In like manner, where paper has been delivered with blanks not filled up, an agency to fill them is created by, and implied from, the delivery of the paper; and if the blanks are filled in excess of the authority given, the maker will still be liable to a *bona fide* holder of the paper for value.⁴ So, if a note is indorsed in blank, and delivered as collateral to one who disposes of it in violation of the agreement under which he holds it, and it comes into the hands of a *bona fide* holder, who surrenders it for a new note from the maker, the indorser cannot afterwards set up against the maker who has thus paid it the want of authority on the part of his own indorsee to transfer it.⁵ So, where the holder of a note places it for sale in the hands of a broker, he will be bound by his representations to a buyer that it is good business paper, and he cannot afterwards set up that the note had no previous existence as a note and was purchased from the broker at a usurious rate of interest.⁶

§ 391. **Commercial Paper Payable to Bearer.**—From these cases the rule may be laid down, that possession carries with it presumptively the ownership and power to dispose of nego-

¹Collins v. Martin, 1 Bos. & P. 648, 2 Esp. 520; Grant v. Vaughan, 3 Burr. 1516.

²Bolton v. Puller, 1 Bos. & P. 539; Ramsbotham v. Cator, 1 Stark. 228.

³Putnam v. Sullivan, 4 Mass. 45 (1808).

⁴Androscoggin Bank v. Kimball, 10 Cush. 373 (1852); Herbert v. Huie, 1 Ala. 18 (1840); Roberts v. Adams, 8 Porter 297 (1838); Putnam v. Sullivan, 4 Mass. 45 (1808); Fullerton v. Sturges, 4 Ohio St. 529 (1855); Johnson v. Blasdale, 1 Sm. & M. 17 (1843); Hemphill v. Bank of Ala., 6 Sm. & M. 44 (1846); Goad v. Hart, 8 Sm. & M. 787 (1847).

⁵Yates v. Valentine, 71 Ill. 643 (1874).

⁶Ahein v. Goodspeed, 9 Hun 263 (1876).

tible paper payable to bearer or indorsed in blank, and the *bona fide* holder of such an instrument is not subject to any defense arising out of the agent's fraud or want of authority.¹ Thus, where the agent draws a bill on his principal which is accepted by the principal for the purpose of obtaining a discount, he will be bound by the agent's subsequent pledge of the bill.² So, if a broker, intrusted with a note for the purpose of sale for his principal's benefit, pledges it for a pre-existing debt of his own, the principal cannot recover it from such pledgee.³ So, if the agent under such circumstances transfers it for the purpose of obtaining indemnity for himself in another matter.⁴ And this has been held to be true even of municipal bonds made by a school district, which are negotiable in form, and have been transferred by the agent in payment of his own debt.⁵ It is also true, in general, of bills and notes indorsed in blank to an agent for collection,⁶ or for safe keeping.⁷

§ 392. **Principal Estopped by Conduct.**—Where one suffers his agent to act ostensibly as principal, in a business name which is used for the principal's business and belongs neither to principal nor agent individually, an acceptance by the agent in such name will bind the principal, although expressly forbidden by him.⁸ So, if one has suffered another to draw bills of exchange in his name, he will be liable to a *bona fide* holder of such bills for value, although he may have received no consideration for, and had no knowledge of, the particular bill in question.⁹ So, where the agent has indorsed a note in excess of his authority and in fraud of his principal, and other notes similarly executed by him have

¹Murrell v. Jones, 40 Miss. 565 (1866).

²Clement v. Leverett, 12 N. H. 317 (1841).

³Giovanovich v. Citizens Bank, 26 La. An. 154 (1874).

⁴Bridenbecker v. Lowell, 32 Barb. 9 (1860).

⁵School District v. State Bank, 8 Neb. 168 (1879).

⁶Stutzman v. Pryne, 23 Iowa 17 (1867).

⁷Ringling v. Kohn, 4 Mo. App. 59 (1877).

⁸Edmunds v. Bushell, L. R. 1 Q. B. 97.

⁹Smith v. Stanger, Peake Add. 116.

been recognized and paid by the principal, a general authority may be implied which will bar the principal from defense in such case against the holder for value without notice.¹ This is true, too, of the fraud of a bank director, misappropriating the proceeds of paper sent to him in his official capacity to be discounted;² or of an accommodation indorsement without authority by the general cashier and financial agent of a note-broking firm;³ and, in general, of bills and notes misapplied by any agent having a general authority.⁴

The principal is bound in like manner, as we have seen by representations of the agent as to the character of such paper discounted for the principal.⁵ And the fact that the principal's instructions to his agent have been violated by him will be no defense against a *bona fide* holder for value, if the agent's act is within the general scope of his business.⁶ It is to be remembered, however, that a general agency to manage a business as a clerk or even, in many cases, as a general manager will not cover notes or bills so as to render the principal liable; especially where the consideration has not been received by the agent in the course of the principal's business.⁷

An indorsement generally warrants the authority of prior parties to sign the paper. But where an indorsee has voluntarily taken up and paid a bill drawn by an agent after personal examination of the agent's authority, and has been afterwards obliged to pay it again by reason of the agent's want of authority, he cannot hold his immediate indorser as warranting the authority of such agent.⁸

§ 393. **Evidence—Burden of Proof.**—Where commercial paper has been executed by an agent, it is always incumbent

¹ Exchange Bank v. Monteath, 26 N. Y. 505 (1863), reversing 17 Barb. 171, 24 *Id.* 371.

² Bank of United States v. Davis, 2 Hill 452 (1842).

³ Edwards v. Thomas, 66 Mo. 468 (1877).

⁴ Hooe v. Oxley, 1 Wash. 19 (Va. 1791).

⁵ North River Bank v. Aymer, 3 Hill 262 (1842).

⁶ Crawford v. Hildebrant, 6 Luns. 502 (1871).

⁷ Bank of Hamburg v. Johnson, 3 Rich. 42 (1846).

⁸ East India Co. v. Tritton, 3 B. & C. 280.

upon the holder to prove the agent's authority in order to render the principal liable. And the burden of making such proof is upon the holder.¹ Where the agent is an officer of an incorporated company, as has been already said, his authority as agent is sometimes to be presumed from his office. Thus, the cashier of a bank will be presumed to have authority to transfer its negotiable securities by indorsement.² But it has been held that where the charter of the company provides that its affairs shall be conducted by a board of directors, it will not be presumed that the president and secretary have authority by virtue of their office to make notes for the company.³ So, if a note be made by the selectmen of a town, the holder must show their authority to bind the town in such manner.⁴ Or if a note be given by the trustees of a school district, their authority must be shown.⁵ So, if the agent, who sells a note for his principal, gives an express warranty of its genuineness, his authority so to do must be shown by the holder of the paper.⁶ And if the holder of a note executed by an agent relies on its ratification by the principal, he must show its execution by the agent and the subsequent adoption by the principal of the unauthorized signature as his own.⁷ But in Texas the holder

¹ *New York Iron Mine v. Citizens Bank*, 44 Mich. 344 (1880); *Northampton Bank v. Pepoon*, 12 Mass. 288 (1814); *Wallace v. Wallace*, 8 Bradw. 69 (1880); *Flax, &c., Manuf. Co. v. Ballentine*, 1 Harr. 454 (N. J. 1838); *Knight v. Lang*, 2 Abb. Pr. 227 (1855); *Spicer v. Smith*, 23 Mich. 96 (1871). This rule is changed as to bank drafts in England by the statute of 16 and 17 Vict. c. 59 § 19, which provides that "any draft or order drawn upon a banker for a sum of money payable to order on demand, which shall when presented for payment purport to be indorsed by the person to whom the same shall be drawn payable, shall be a sufficient authority to such banker to pay the amount of such draft or order to the bearer thereof, and it shall not be incumbent on such banker to prove that such indorsement or any subsequent indorsement was made by or under the direction or authority of the person to whom the said draft or order was or is made payable, either by the drawer or any indorser thereof." And this act applies to the indorsement of the name of the payee "A. B., per C. D., agent," *Charles v. Blackwell*, L. R. 1 C. P. D. 548; S. C., 2 *Ib.* 151 (1877).

² *Wild v. Bank of Passamaquoddy*, 3 Mass. 505 (1825).

³ *McCullough v. Moss*, 5 Den. 567, 575 (1846).

⁴ *Great Falls Bank v. Farmington*, 41 N. H. 32 (1860); *Andover v. Grafton*, 7 *Ib.* 294 (1834); *Rich v. Enol*, 51 N. H. 350 (1871).

⁵ *School District v. Thompson*, 5 Minn. 280 (1861).

⁶ *Wilder v. Cowles*, 100 Mass. 487 (1868).

⁷ *Cravens v. Gillilan*, 63 Mo. 28 (1876).

of a note purporting to be executed by an agent need not prove the execution nor the authority of the agent, unless they are expressly denied in the pleading.¹

At common law the averment that the defendant accepted or drew a bill of exchange "in his own proper handwriting," was formerly held to be supported by proof of signature by an authorized agent, and could be rejected as surplusage, if untrue.² This has now been changed by the recent English rules of pleading, where there is no proof of a subsequent promise by the principal.³

Where it is incumbent on the holder of a bill or note, to prove the agent's authority as agent of the maker or indorser, this may be done by parol evidence.⁴ And even though the bill itself shows the agent to have acted under a special written authority, other evidence is admissible to establish this authority.⁵ Where an agent has executed a draft for his principal, the agent's statements as to a former draft, executed by him under similar circumstances and paid by his principal, have been held admissible as evidence of his agency.⁶ And admissions on the principal's part of his authority to execute another similar acceptance have been held admissible in confirmation of other evidence showing a general authority for the acceptance in question.⁷ On the other hand, where the payee's indorsement has been made by an agent, the payee's admission, in writing, of his agent's authority is not competent evidence of that fact in an action by the indorsee against the maker.⁸

¹ *Brashear v. Martin*, 25 Tex. 202 (1860).

² Byles 631; Chitty 642; *Booth v. Grove*, Moo. & M. 182; S. C., 3 C. & P. 335. And although since the recent English rules of pleading, 1 Will. IV., such averment if untrue will subject the plaintiff to costs, it may still be supported by evidence of a subsequent promise by defendant to pay, *Helmsley v. Loader*, 2 Campb. 450.

³ *Levy v. Wilson*, 5 Esp. 180.

⁴ *Miller v. Moore*, 1 Cranch C. C. 471 (1807); *Morse v. Green*, 13 N. H. 32 (1842); *Cain v. Mack*, 33 Tex. 135 (1870); *McWhirt v. McKee*, 6 Kans. 412 (1870).

⁵ *Page v. Lathrop*, 20 Mo. 589 (1855).

⁶ *MacDonough v. Heyman*, 38 Mich. 334 (1878).

⁷ *Llewellyn v. Winckworth*, 13 Mees. & W. 598 (1845).

⁸ *Clark v. Peabody*, 22 Me. 500 (1843).

CHAPTER XII.

CAPACITY—PARTNERS, EXECUTORS, &c.

*I. Partners.**II. Personal Representatives.*

I. PARTNERS.

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§ 394. **General Powers.**—Commercial paper is frequently made and transferred by partners, and the execution of it

on behalf of the firm is seldom if ever by all the members of the firm. It is a general rule that partners in mercantile business have power to give, transfer and accept bills, notes and checks in the firm name and business.¹ And each member of the firm has authority to sign the firm name to such paper in its business. This applies also to indorsements.² And the execution of a bill or note by one partner in the name of the firm will support an averment of its execution by the firm.³ Where a firm has become liable, as agents for the amount of certain notes taken for its principal without authority, it has been held that one partner may bind the firm by a settlement made with the principal by signing the firm name to the notes as a co-maker.⁴

And a partner may bind his firm by a note in the firm name given to a creditor in settlement of an existing liability of the firm, although the power to bind the firm by such paper, in general, is withheld by the articles of partnership.⁵ And in Illinois where the common law distinction between sealed and unsealed instruments is done away, it has been held that a partner might bind his firm by a note under seal signed in its name, and given for money borrowed for its use.⁶ So, one partner may bind the firm by a warranty given in the sale by him of a firm note;⁷ and, under special

¹ Byles 44; Chitty 52; 1 Daniels 326; 1 Edwards § 97; 1 Parsons 123; Story on Prom. Notes § 72; Story on Partnership § 102; Harrison v. Jackson, 7 T. R. 207; Pinkney v. Hall, 1 Salk. 126; S. C., 1 Ld. Raym. 175; Lane v. Williams, 2 Vern. 277; Wells v. Masterman, 2 Esp. 731; Swan v. Steele, 7 East 210; Ridley v. Taylor, 13 Ib. 175; Shirreff v. Wilks, 1 Ib. 48; Sutton v. Gregory, Peake Add. 150; *Ex parte Bonbonus*, 8 Ves. 542; *Ex parte Gardom*, 15 Ib. 286; Wiseman v. Easton, 8 L. T. (N. S.) 637 (1863); National Union Bank v. Landon, 66 Barb. 189 (1870); Williams v. Conner, 14 So. Car. 621 (1880); Sherwood v. Snow, 46 Iowa 481 (1877); Stimson v. Whitney, 130 Mass. 591 (1881); Drennen v. House, 41 Penna. St. 30 (1861). See, also, 15 Cent. L. J. 302.

² Walker v. Kee, 14 So. Car. 142 (1880); Barrett v. Russell, 45 Vt. 43 (1872). Especially where the proceeds have gone to the firm, Mohawk Nat. Bank v. Van Slyck, 29 Hun 188 (1883).

³ Porter v. Cummings, 7 Wend. 172 (1831). But not without proof of authority or partnership, a note signed by one in the individual names of all, Pease v. Morgan, 7 Johns. 468 (1811).

⁴ Brayley v. Hedges, 52 Iowa 623 (1879).

⁵ Langan v. Hewett, 13 Sm. & M. 122 (1849).

⁶ Walsh v. Lennon, 98 Ill. 27 (1881).

⁷ Sweet v. Bradley, 24 Barb. 549 (1857).

circumstances, by a contract guaranteeing payment for purchases made by another on the credit of the guarantor.¹

So, a partner has the general power to assign and dispose of the assets of the firm and to bind the firm by such acts.² And it has even been held that in the case of insolvency of the firm one partner may assign its property to a creditor with preferences, so as to bind the firm.³ But one partner cannot make a general assignment of the partnership property to a trustee for the benefit of creditors in the presence of the other partners and against their will or without their consent.⁴ Nor can one partner bind the other by his submission of their affairs to arbitration without express or clearly implied authority.⁵

The power of partnerships to execute commercial paper in the firm name by the hand of one partner is recognized generally by the mercantile law of the world, and it is expressly provided for by statute in some States. The laws of Hungary require the partnership contract in such case to be deposited with the court and the partnership name to be registered in a public register.⁶ And the statutes of the Argentine Republic make express provision for the transfer by one partner in the firm name of bills of exchange drawn in favor of the firm.⁷

§ 395. **Partners by Implication.**—The relation of partners to one another is in general created and regulated by express contract, although it may arise even among themselves by implication. As to other parties, one who represents himself to be a partner and is not so becomes liable thereby to parties relying on such representation and taking obligations of the

¹*Ex parte Gardom*, 15 Ves. 286. A partner has not, in general, power to bind his firm by a contract in its name as guarantor or surety, *Parsons on Partnership* 216. And see *infra*, as to commercial paper of such character.

²*Harrison v. Sterry*, 5 Cranch 289 (1809).

³*Mabbett v. White*, 12 N. Y. 442 (1855).

⁴*Deming v. Colt*, 3 Sandf. 284 (1849).

⁵*Adams v. Bankhart*, 5 Tyrw. 425 (1835).

⁶*Hungary* (Exch. Law 1861 Art. 12).

⁷*Argentine Republic* (Code Com. 1862 Art. 809).

firm on the strength of it.¹ So, if a person knowingly suffers another to use his name with his own as that of a firm, he will become liable as a partner on a note or bill given in such firm name, although between themselves no such relation may exist.² In such case he will be liable to any one to whom he has been held out as such partner with his knowledge and sufferance, and who has relied on such information.³ But representations of the sort made to other persons will not render him liable as a partner to any one to whom they were not communicated.⁴

§ 396. **Dormant and Special Partners.**—The liability of all the partners in a firm upon a bill or note given in its name extends also to dormant parties, whose names do not appear in that of the firm.⁵ Thus, a note given by an active partner in the firm's name, in the hands of a *bona fide* holder believing it to be, as represented, for the use of the firm, will bind dormant as well as active partners in the firm.⁶ Where, however, a creditor deals with the firm without knowing of any dormant partner and learns subsequently of his existence, he may elect to proceed against all the partners or against the active partners only; and, in the latter case, he cannot be compelled to join the dormant partner.⁷ In like manner, the ostensible partner may bring suit on a partnership contract without joining the dormant partner.⁸ And

¹ Chitty 51; 1 Edwards § 96; Harvey v. Kay, 9 B. & C. 356; Fox v. Clifton, 6 Bing. 791; S. C., 4 Moo. & P. 676; Doubleday v. Muskett, 7 Bing. 117; S. C., 4 Moo. & P. 750; *Ex parte* Langdale, 18 Ves. 300.

² Smith v. Hill, 45 Vt. 90 (1872).

³ Byles 50; 1 Daniel 323; Dickinson v. Valpy, 10 B. & C. 141; S. C., 5 M. & Ry. 126; Gurney v. Evans, 3 Hurlst. & N. 122.

⁴ Chitty 52; Vice v. Lady Anson, 7 B. & C. 409; Vere v. Ashby, 10 *Ib.* 288; Carter v. Whalley, 1 B. & Ad. 13.

⁵ Byles 50; Chitty 55; 1 Edwards § 108; Vere v. Ashby, *supra*; Lloyd v. Ashby, 2 B. & Ad. 23; Swan v. Steele, 7 East 210; Wintle v. Crowther, 1 Tyrw. 215; S. C., 1 C. & J. 310; Gurney v. Evans, 27 L. J. Exch. 166 (1858); even though given for a debt of the old firm of which he was not a member, Lloyd v. Ashby, *supra*. See, too, Boudreaux v. Martinez, 25 La. An. 167 (1873); Bradshaw v. Apperson, 36 Tex. 133 (1871).

⁶ Etheridge v. Binney, 9 Pick. 272 (1830).

⁷ Chitty 57; *Ex parte* Norfolk, 19 Ves. 455; *Ex parte* Hodgkinson, *Ib.* 291; *Ex parte* Hamper, 17 *Ib.* 403; Benfield's Case, 5 *Ib.* 424.

⁸ Leveck v. Shafto, 2 Esp. 468; Lloyd v. Archbowl, 2 Taunt. 324; Mawman v. Gillett, 2 Taunt. 325 n.; Kell v. Nainby, 10 B. & C. 20.

if the agreement which provides for the dormant partnership is dated back, it will not act retrospectively, so as to render the dormant partner liable on paper actually given before the agreement, although after its date, for the benefit of the original active partners.¹ But where a firm which has a dormant partner is dissolved, and its commercial paper is afterward renewed without any intention of discharging the firm, the former dormant partner with the others will still remain liable on the original paper.²

Many of the States provide by statute for limited or special partnership. In most of these cases the special partner's liability is limited by statute to the capital actually invested by him in the concern; and he is not liable, and cannot be sued, upon contracts made by the firm in its partnership name. For a consideration of special partnerships the reader must be referred to books relating particularly to the law on that subject. As regards persons contracting with the firm, a special partner is virtually not a member of the firm.

§ 397. **New Partners—Anticipation.**—Where new partners come into a firm, although the name of the former firm continues, the new partners do not become liable on that account for the debts of the old firm. A new partner will not be liable to a holder with notice upon an acceptance given by the old partners in the firm name for a debt of the former firm.³ But the new partner, though not liable for the debt of the old firm, will be liable to a holder for value and without notice on an acceptance given in the firm name for a debt of the old firm.⁴ And it has been held that where the new firm assumes the debt of the old firm, and promises to pay the holder, giving its note for it, it thereby makes the debt its own, and the note is not a promise to pay the debt of another.⁵

¹ Byles 50; Vere v. Ashby, 10 B. & C. 288. See, too, Wilson v. Tumman, 6 Man. & G. 236; Battley v. Lewis, 1 Ib. 155; S. C., 1 Scott N. R. 143.

² Parker v. Canfield, 37 Conn. 250 (1870). For a fuller discussion of this question the reader is referred to the chapter on Payment by Note, *infra*.

³ Byles 49; Shirreff v. Wilks, 1 East 48.

⁴ See Saville v. Robertson, 4 T. R. 720.

⁵ Osborn v. Osborn, 36 Mich. 48 (1877).

Sometimes the firm name is used in *anticipation* of a partnership to be formed. In such case, where a bill has been drawn on a firm before it was formed, the members of the firm will be bound by a subsequent acceptance in the firm name by one partner.¹ So, the partners may be bound by a bill or note given in the firm name without authority and in anticipation but subsequently ratified.² But the firm will not be liable on a bill of exchange drawn in the firm name by one partner, for advances made to him before the commencement of the partnership;³ nor on a bill given by one partner in the firm name before its formation to raise money for himself.⁴ And a firm will not be liable for a note given by one partner in anticipation in its name for money loaned him, although the money be afterward used in the partnership business.⁵

§ 398. **Power Limited to Partnership Business.**—The power of a partner to bind his firm by commercial paper executed in its name is confined to transactions in the business of the partnership.⁶ But where a bill or note is given in the partnership name, it is presumed in the absence of contrary evidence to have been given in the partnership business.⁷ And

¹Westcott v. Price, Wright 220 (1863).

²Chitty 59; Fox v. Clifton, 6 Bing. 776; *Ex parte* Bonbonus, 8 Ves. 542; Thicknesse v. Bromilow, 2 C. & J. 425.

³Chitty 59; Green v. Deakin, 2 Stark. 347.

⁴Chitty 58; Greenslade v. Dower, 7 B. & C. 635; S. C., 1 M. & Ry. 640; Saville v. Robertson, 4 T. R. 720.

⁵Baxter v. Plunkett, 4 Houst. 450 (1872).

⁶Livingston v. Roosevelt, 4 Johns. 251 (1809); Hotchkiss v. English, 4 Hun 369; S. C., 6 T. & C. 658 (1875); Graves v. Kellenberger, 51 Ind. 66 (1875); Stegall v. Coney, 49 Miss. 761 (1874); Norton v. Thatcher, 8 Neb. 186 (1879); Atlantic State Bank of Brooklyn v. Savery, 82 N. Y. 291 (1880); Tompkins v. Woodyard, 5 W. Va. 216 (1872); Newiman v. Richardson, 9 Fed. Rep. 865 (1881). Where a firm of agents has incurred liability as such for a breach of contract, a note given in settlement by one partner is in the business of the firm and binds all, Brayley v. Hedges, 52 Iowa 623 (1879). And if a partner originally gave his individual note for a firm debt, he may afterward renew it or indorse the renewal in the firm name, Wilson v. Richards, 28 Minn. 337 (1881).

⁷Doty v. Bates, 11 Johns. 544 (1814); Carrier v. Cameron, 31 Mich. 373 (1875); National Union Bank v. Landon, 66 Barb. 193 (1870); Abpt v. Miller, 5 Jones 32 (1857); Church v. Sparrow, 5 Wend. 223 (1830); Whitaker v. Brown, 16 Ib. 507 (1836); Thurston v. Lloyd, 4 Md. 283 (1853); Manning v. Hays, 6 Ib. 5 (1854); Mifflin v. Smith, 17 Serg. & R. 165 (1828); Hamilton v.

it has been held that this presumption is not destroyed by the fact that the bill drawn in the firm name was made payable to one partner and discounted by him and the proceeds of the discount paid to him.¹

§ 399. **Partnership Consent—Implied or Presumed.**—The liability of partners upon paper given by one partner in the firm name is derived from their consent, expressed or implied. In general, such consent is implied from the business of the firm and the custom of merchants. If the paper is not given in the partnership business, and this fact appears, the consent of the other partners must be proved affirmatively.² But it is not necessary to such consent that the partners should have actual knowledge of the particular transaction. Consent may be implied from the nature of the partnership.³ Or it may be implied, like the authority from principal to agent, from the fact that in other transactions and with other parties the partner has acquiesced in the use of the firm name in this manner.⁴ So, the consent of one partner to such contract may be implied from subsequent conduct inconsistent with a disclaimer on his part.⁵

Subsequent ratification by him may be implied, as in the similar relation of principal and agent.⁶ Receiving the proceeds of the bill or delay in disaffirming it will amount to a ratification.⁷ Where a note is made by one firm and

Summers, 12 B. Mon. 11 (1851); *Ensminger v. Marvin*, 5 Blackf. 210 (1839); *Adams v. Ruggles*, 17 Kans. 237 (1876); *Holmes v. Porter*, 39 Me. 157 (1855); *Hayward v. French*, 12 Gray 453 (1859); *Moorehead v. Gilmore*, 77 Penna. St. 118 (1874); *Sherwood v. Snow*, 46 Iowa 481 (1877); *Davis v. Cook*, 14 Nev. 265 (1879); *Lindh v. Crowley*, 29 Kans. 756 (1883); *Marsh v. Thompson Nat. Bank*, 21 Bradw. 217 (1878).

¹ *Haldeman v. Bank of Middletown*, 28 Penna. St. 440 (1857).

² *Mercein v. Andrus*, 10 Wend. 461 (1833); *Waller v. Keyes*, 6 Vt. 257 (1834).

³ *Smith v. Lusher*, 5 Cow. 688 (1825). Of course the partner executing the paper cannot defend on the ground of a want of authority to do so, *Louisiana Ins. Co. v. Walters*, 25 La. An. 560 (1873).

⁴ *Ditts v. Lonsdale*, 49 Ind. 521 (1875).

⁵ *Dudley v. Littlefield*, 21 Me. 418 (1842).

⁶ 1 Parsons 142.

⁷ See *Richardson v. French*, 4 Mete. 577 (1842), where the firm received the proceeds; and *Foster v. Andrews*, 2 Penr. & W. 160 (1830), where the firm failed to disaffirm a note after learning that it had been given for the partner's individual debt.

indorsed by another to a person who is a common partner in both firms, their assent will be presumed in favor of a *bona fide* holder for value.¹ And although the holder of a note, made in the name of one partner for his individual benefit, and indorsed by him in the firm name without authority of the firm, has taken it with knowledge of this circumstance, the other partners will be bound without any independent consideration by their subsequent promise to pay the note.² But where a partner holding money individually in trust for another has applied it without his partners' knowledge to the use of the firm, this will not render the firm liable for the money. Although it would have been otherwise if the partners had known of the application of the money.³ Where one partner had no power originally to bind the firm, a subsequent ratification by his partners will not amount to an original authority.⁴ If a note, left with a member of a law firm to be sent into another county for collection, was so forwarded by him and collected by the agent of the firm, but never remitted to them, the other partner can only be held liable on evidence of a ratification by him, the transaction not being strictly within the business of the partnership.⁵

The consent of one partner to a note made in the firm name by a second partner will be binding only on himself and not on a third member of the firm.⁶ Although it has been held that an acceptance in the name of a firm by one of its members will bind the firm, where all appear to have knowledge of it, even if such knowledge has only been clearly proved as to one of two other partners.⁷

¹ *Ihmsen v. Negley*, 25 Penna. St. 297 (1855).

² *Commercial Bank of Buffalo v. Warren*, 15 N. Y. 577 (1857).

³ *Jaques v. Marquand*, 6 Cow. 497 (1826). As to the effect of using the proceeds of such paper in the firm business, see, also, *Deitz v. Regnier*, 27 Kans. 94 (1882).

⁴ *Byles* 49; *Duncan v. Lowndes*, 3 Campb. 478. See, too, *Vere v. Ashby*, 10 B. & C. 288; *Wilson v. Tumman*, 6 Man. & G. 236. But see 1 *Parsons* 142.

⁵ *Brent v. Davis*, 9 Md. 217 (1856).

⁶ *King v. Faber*, 22 Penna. St. 21 (1853).

⁷ *Flemming v. Prescott*, 3 Rich. 307 (1831).

§ 400. The presumption of assent extends, in general, only to negotiable paper, and where a non-negotiable note is indorsed by one partner in the name of his firm, the burden of proof is on the indorsee to show the assent or ratification of the other partners.¹

Inasmuch as the partnership liability is based on the consent of all, expressed or implied, it follows that the members of a firm will not be liable on paper executed without their consent at suit of a party who knows of this want of consent.² And the fact that the other partner offered to sign as indorser, while he refused to sign as a joint maker, will not render him liable to the payee on a joint note executed in the firm name.³ It has been held that a partner may be bound by the act of the majority of the firm, notwithstanding his expressed dissent, and although this fact was known to the holder. These cases seem, however, to have rested on a liability of the firm, independent of the paper in question and serving as considerations for it.⁴ The dissent of a partner to a contract of the firm is a question of fact for the jury.⁵ And the jury may consider his conversation offered in evidence to show his consent to such use of the firm name.⁶ But the mere declaration of one partner making a note, that an accommodation indorsement was obtained by him for the use of the firm and that the proceeds went to the benefit of the firm, will not be sufficient to bind the firm.⁷

¹*Sweetser v. French*, 2 Cush. 309 (1848).

²*Byles* 47; 1 *Daniel* 329; 1 *Edwards* § 102; 1 *Parsons* 129; *Heilbut v. Nevill*, L. R. 5 C. P. 478; *Lord Gallway v. Matthew*, 10 East 264; *Wilson v. Dyson*, 1 Stark. 164. But see *Moffitt v. Roche*, 92 Ind. 96 (1883), to the effect that there must be knowledge of objection on the part of such partner and not of the mere lack of consent.

³*Leavitt v. Peck*, 3 Conn. 124 (1819).

⁴1 *Edwards* § 98. And see *Wilkins v. Pearce*, 5 Den. 541 (1848), where it was so held as to an agreement by one partner to indemnify one who signed accommodation paper for the firm. So, it has been held that a firm will be liable on notes given in its name by a majority of the partners for supplies purchased by them in the firm business notwithstanding the dissent of one partner, *Johnston v. Dutton*, 27 Ala. 245 (1855).

⁵*Vice v. Fleming*, 1 Younge and J. 227.

⁶*Windham Co. Bank v. Kendall*, 7 R. I. 77 (1861).

⁷*Uhler v. Browning*, 4 Dutch. 79 (1859).

§ 401. **Business Foreign to Partnership.**—If a bill of exchange is made by one partner in the partnership name but not in its business, it is still ostensibly the paper of the firm, and as such will bind the firm at suit of a *bona fide* holder for value before maturity.¹ And although such a holder has taken a renewal of such note in the firm name, after learning that the original note was given in a business which did not concern the firm and without the other partner's knowledge, he can still recover against the firm by virtue of his original character as a *bona fide* holder of the original note.² But though a firm is bound by a note in the partnership name, the members of it will only be bound jointly on a joint and several note executed in the name of the partners.³ And the power of a partner to execute or indorse commercial paper for his firm, gives him no power to bind an individual partner by acting in his name.⁴

§ 402. **Release or Defense Affecting All.**—Where a defense exists against one partner, it will affect the rights of all the firm.⁵ Thus, if an acceptor is relieved from his liability as to one of a firm drawing a bill of exchange by the individual promise of that partner to provide for it, this will form a good defense as to all the partners.⁶ So, if a bill of exchange

¹ *Ridley v. Taylor*, 13 East 175; *Sherwood v. Snow*, 46 Iowa 481 (1877); *First National Bank of Chittanooga v. Morgan*, 6 Hun 346 (1876), affirmed 73 N. Y. 593 (1878); *Gregg v. Fisher*, 3 Ill. App. 261 (1878); *Sedgwick v. Lewis*, 70 Penna. St. 217 (1871); *Faler v. Jordan*, 44 Miss. 283 (1870); *Smith v. Lusher*, 5 Cow. 688, 709 (1825); *Rolston v. Click*, 1 Stew. 526 (Ala. 1828); *Silverstein v. Atkinson*, 45 Miss. 81 (1871).

² *Hopkins v. Boyd*, 11 Md. 107 (1857).

³ *Byles* 45; *Chitty* 73; 1 *Daniel* 331; 1 *Parsons* 136; *Perring v. Hone*, 4 Bing. 28; *S. C.*, 12 *Moore* 125, 2 *C. & P.* 401; *McClae v. Sutherland*, 3 *El. & Bl.* 36.

⁴ *McCauley v. Gordon*, 64 *Ga.* 221 (1879).

⁵ *Byles* 46; 1 *Daniel* 325; *Astley v. Johnson*, 5 *H. & N.* 137; *Brandon v. Scott*, 7 *El. & Bl.* 234. In like manner the discharge of one is the discharge of all, *Westcott v. Price*, *Wright* 220 (1833).

⁶ *Richmond v. Hersy*, 1 *Stark.* 202, the proceeds of the acceptance in this case having been used in payment of previous accommodation acceptances. So, too, a like promise of the individual drawer of a bill to provide for it relieves the acceptor in a suit brought by the drawer's firm, to whom the bill had been indorsed, *Sparrow v. Chisman*, 9 *B. & C.* 241; *S. C.*, 4 *M. & Ry.* 206. But one partner cannot set off his individual debt by way of a receipt against a note held by his firm so as to bind its creditors, *Mayer v. Garber*, 53 *Iowa* 689 (1880).

is drawn or accepted for the accommodation of one partner, and is afterward transferred to his firm, the firm cannot recover against the accommodation drawer or acceptor.¹

§ 403. **Contracts between Partners.**—On the other hand, the relation of the individual partners to one another in matters not relating to firm business is like that of strangers, and they may contract with and sue one another as such. Thus, one partner, may give his note to another, even in consideration of advances made by the payee of the note in settlement of the maker's debts to the firm.² So, one partner may sue another on his individual note, although the partnership business may not have been settled between them.³

One partner cannot, however, sue another for any debt or claim on which he would be ultimately liable to contribute as a partner.⁴ Thus, one partner after the dissolution of the firm, being retained to defend the others in a matter involving their joint liability, and incurring a bill of costs in such defense, to which he would be liable to contribute as partner, cannot maintain an action at common law against the others to recover the bill of costs.⁵ So, if one partner obtains possession of a bill of exchange drawn, accepted or indorsed by another for the firm, he cannot sue the other partner or the firm upon it.⁶

As one cannot be both plaintiff and defendant in the same suit, a firm cannot as such sue one of its own members to recover money obtained by him on a draft given in the firm name for his individual debt.⁷ So, where the indorsees and holders of a note are a firm having one partner in common

¹*Jones v. Yates*, 9 B. & C. 539; *Sandilands v. Marsh*, 2 B. & Ald. 673; *Rapp v. Latham*, *Id.* 795.

²*Chamberlain v. Walker*, 10 Allen 429 (1865).

³*Jemison v. Walsh*, 30 Ind. 167 (1868). This might, of course, affect the amount of the recovery.

⁴*Holmes v. Higgins*, 1 B. & C. 74; *Teague v. Hubbard*, 8 B. & C. 345; *S. C.* 2 M. & Ry. 369.

⁵*Milburn v. Codd*, 7 B. & C. 419.

⁶*Neale v. Turton*, 4 Bing. 149; *S. C.*, 12 Moore 365; *Westcott v. Price, Wright* 220 (1833).

⁷*Blodgett v. Sleeper*, 67 Me. 499 (1877).

with the indorsing firm, they cannot sue the other indorser upon the indorsement, omitting the common partner, and at common law the omission may be pleaded in abatement.¹ So, one cannot sue his co-maker on a note, of which he has become the sole holder.² And it has even been held that where a member and agent of a joint stock company drew and indorsed a bill of exchange on its account in his own name to another agent of the company, who transferred it to a creditor (also a member) of the company, this last holder could not sue the drawer of the bill.³ Where, however, a joint and several note was given by two makers, of whom one was also one of the payees, it was held that both payees might bring suit on the note against the other maker.⁴

§ 404. **Actions against Partnership—By Indorsee.**—Although a partnership cannot, for the reason alleged, sue one of its members or be sued by him, yet a firm making a note to one partner or taking a note from him will be liable to a subsequent indorsee who is not member of the firm.⁵ And the indorsee can recover on such an instrument, although he knew of the partnership and the relation of maker and indorser to one another.⁶ So, when a firm note is transferred by the payee to a member of the firm for value, his purchase of the paper will not amount to a payment of it, and if it is indorsed over by him to another, the last

¹ *Mainwaring v. Newman*, 2 Bos. & P. 120.

² *Moffat v. Van Millingen*, 2 Bos. & P. 124 *n*.

³ *Teague v. Hubbard*, 8 B. & C. 345; S. C., 2 M. & Ry. 369.

⁴ *Beecham v. Smith*, El. Bl. & El. 442.

⁵ *Morley v. Culverwell*, 7 M. & W. 174; *Steele v. Harmer*, 15 L. J. Exch. 219, 14 M. & W. 831; S. C., 19 L. J. Exch. 34, 4 Exch. 1; *Smith v. Lusher*, 5 Cow. 688 (1825); *Hapgood v. Watson*, 65 Me. 510 (1876); *Pitcher v. Barrows*, 17 Pick. 361 (1835); *Ormsbee v. Kidder*, 48 Vt. 361 (1875); *Young v. Chew*, 9 Mo. App. 387 (1880). It cannot, however, be shown by parol as to such a note that the intention was to transpose the relation of maker and indorser, in order to excuse a failure to make proper presentment and protest, *Coon v. Pruden*, 25 Minn. 105 (1878). And where such a note has been destroyed by an accident and afterward assigned by the payee to another to enable him to bring suit against the firm, such assignee has been held in Michigan incapable of suing at law and left like the original payee to his remedy in equity, *Davis v. Merrill*, 51 Mich. 480 (1883).

⁶ *Smith v. Lusher*, 5 Cow. 688 (1825).

holder may recover against the firm.¹ And the fact that the statute of Massachusetts makes legal defenses against the payee of a demand note available against the indorsee also, will not destroy the indorsee's right to recover on a note made by a firm to one of its members and by him indorsed to the holder because his indorser could not sue.² If, however, a firm note to one member of the firm is indorsed after its maturity and after dissolution of the firm, the indorsee will take it subject to the defense of an unsettled account between the firm and the individual partner who is the payee.³

Holders of scrip in a joint stock company are not, however, such partners as to be incapable of bringing suit against the directors of the company on a note made by them.⁴ And if a note is made by one member of a corporation individually to another for the use of the company, the maker cannot plead their common interest in the concern in a defense of a suit by the payee.⁵ Two firms having a partner in common may stand in the relation to one another of maker and indorser on the same paper, and the fact that a bill of exchange has been drawn in the name of one firm and indorsed in the name of the other in the same handwriting by their common partner is no cause of suspicion or evidence of bad faith to put the purchaser upon inquiry as to the character of the paper.⁶ And the indorsee's knowledge of the fact that the two firms have a partner in common will not be such notice as will affect the liability of the firm indorsing the paper.⁷ So, if a bill of exchange is drawn by one firm upon another having a common partner in it, and is accepted by that partner without the knowledge

¹ *Kipp v. McChesney*, 66 Ill. 460 (1872).

² *Thayer v. Buffum*, 11 Metc. 398 (1846).

³ *Davis v. Briggs*, 39 Me. 304 (1855).

⁴ *Fox v. Frith*, 10 M. & W. 131.

⁵ *Mahan v. Sherman*, 7 Blackf. 378 (1844).

⁶ *Miller v. Consolidation Bank*, 48 Penna. St. 514 (1865); *Ihmsen v. Negley*, 25 *Ib.* 697 (1855).

⁷ *Stimson v. Whitney*, 130 Mass. 591 (1881).

of the other partners in the firm drawn on, the acceptance will still be binding *prima facie* upon the firm.¹

§ 405. **What Partnerships Cannot Execute Commercial Paper.**—The rule which renders partnerships liable on bills and notes executed by one member of the firm only applies to firms engaged in commercial business. Special partnerships for other purposes than trade are not, in general, bound by commercial paper executed in their name by one partner without express authority of the others.² Thus, a firm of attorneys at law will not be bound by such paper executed by one member.³ Although similar notes, executed in such manner and recognized by the firm, are admissible as evidence of an authority in such case.⁴ In like manner, a firm of physicians will not be bound by a bill of exchange given by one of them for the purpose of raising money.⁵ So, stock brokers will not be bound by such paper;⁶ nor tavern keepers;⁷ nor a firm of coffee brokers;⁸ nor a special partnership formed for the purpose of putting up a steam saw mill.⁹ So partners, engaged in the business of carriage building, have

¹Tutt v. Addams, 24 Mo. 186 (1857).

²Bytes 46; Chitty 58, 59; 1 Edwards § 98; 1 Parsons 138; 1 Daniel 328; Greenslade v. Dower, 7 B. & C. 635, 1 M. & Ry. 640; Dickinson v. Valpy, 10 B. & C. 125; S. C., 5 M. & Ry. 126; Bramah v. Roberts, 3 Bing. N. C. 963, 5 Scott 172; Ricketts v. Bennett, 4 C. B. 699 (1847); Yates v. Dalton, 28 L. J. Exch. 69 (1859); Brown v. Kidger, 3 H. & N. 853; Ulery v. Ginrick, 57 Ill. 531 (1871); Zuel v. Bowen, 78 Ib. 234 (1875); Smith v. Sloan, 37 Wis. 285 (1875); McCrary v. Slaughter, 58 Ala. 230 (1877); Kimbro v. Bullitt, 22 How. 256 (1859); Hunt v. Chapin, 6 Lans. 139 (1872).

³Bytes 46; 1 Daniel 328; 1 Edwards § 101; 1 Parsons 138; Hedley v. Bainbridge, 3 Q. B. 316; Forster v. Mackreth, L. R. 2 Exch. 163 (1867); Garland v. Jacomb, 8 Ib. 219 (1873); Levy v. Pyne, C. & M. 453 (1842); Breckinridge v. Shrieve, 4 Dana 375 (1836); Smith v. Sloan, 37 Wis. 285 (1875); Friend v. Duryee, 17 Fla. 111 (1879).

⁴Levy v. Pyne, C. & M. 453 (1842).

⁵Crosthwait v. Ross, 1 Humph. 23 (1839). But it is said in this case that such a note would bind the firm if given for the purchase of things necessary to its business.

⁶Bytes 46; Yates v. Dalton, 28 L. J. Exch. 69.

⁷Cocke v. Branch Bank, 3 Ala. 175 (1841). In this case the note was not given in the firm business and the defense was allowed against a *bona fide* holder for value.

⁸Third Nat. Bank v. Snyder, 10 Mo. App. 211 (1881). And see Huguley v. Morris, 65 Ga. 666 (1880).

⁹Lanier v. McCabe, 2 Fla. 32 (1848).

no implied authority to open a bank account in one another's names so as to charge one another by checks upon it.¹ Nor can persons engaged in jointly carrying on a farm or plantation;² especially where all inference of such authority is expressly excluded by the articles of partnership which provide for the furnishing by one partner of the very article for which he gave the partnership note in question.³

But collecting agents, doing business as a firm, have been held liable on a partnership note given by one of the partners for money collected by the firm.⁴ So, a mining partnership may become liable for a bill of exchange given by the managing partner for money borrowed on the credit of the firm and in its business, where such paper is expressly mentioned in the articles of partnership as a ground upon which the partners may dissolve the firm if made for other than the immediate use of the firm.⁵ And where a firm has actually and knowingly used property obtained for it by means of bills of exchange or notes executed without authority by its superintendent it will be estopped from setting up such want of authority.⁶

§ 406. **Joint Payees Not Partners—Joint Tenants.**—Where a bill or note is made payable to several persons jointly, the payees are in no sense partners therein, and neither of them can bind the other by an indorsement for both.⁷ So, where

¹ *Alliance Bank v. Kearsley*, L. R. 6 C. P. 493 (1871).

² *Hunt v. Chapin*, 6 Laus. 139 (1872); *Prince v. Crawford*, 50 Miss. 344 (1874). See, too, *Davis v. Richardson*, 45 Miss. 499 (1871).

³ *McCrary v. Slaughter*, 58 Ala. 230 (1877).

⁴ *Van Brunt v. Mather*, 48 Iowa 503 (1878).

⁵ *Brown v. Kidger*, 3 Hurlstone & N. 853 (1858).

⁶ *Jones v. Clark*, 42 Cal. 180 (1871).

⁷ *Wood v. Wood*, 1 Harr. 428 (N. J. 1838). But see *Carvick v. Vickery*, Dougl. 653, where a bill of exchange drawn by two persons payable to themselves or order was indorsed by one only and a recovery was had under such indorsement against the acceptor. In this case, however, as observed by Hornblower, C. J., in *Wood v. Wood*, *supra*, the acceptance was given after the bill was so indorsed and transferred to the plaintiff. This is true also of the indorsement of a note made payable to two persons as executors, *Smith v. Whiting*, 9 Mass. 334 (1812); *Sanders v. Blain*, 6 J. J. Marsh. 446 (1831); *Johnson v. Mangum*, 65 N. C. 146 (1871). And if a note is payable to A. and B., who are not partners, and indorsed in both names by A. with B.'s consent, B.'s interest will be transferred by the indorsement, *Cooper v. Bailey*, 52 Me. 230.

two employ a common factor who draws a bill on them, neither can bind the other by his acceptance of it.¹ So, where two persons buy a farm under an agreement to pay for it in notes indorsed by them both, they do not become partners, and neither one has power to indorse such notes for the other.²

In like manner, joint owners of property are not partners who can bind one another by a bill or note.³ This is true even where the persons are joint owners of a ship and one gives an acceptance for necessities furnished for it.⁴ So, joint tenants and tenants in common of property real or personal have no power to bind one another as partners by their commercial paper.⁵ Neither can persons bind one another as such because of their common interest in a joint undertaking, but such paper must be signed by all the parties interested.⁶ It has been held, however, that where two persons are jointly interested in disposing of a quantity of salt, and the whole business and sale of it is put into the hands of one, they are limited partners in trade, and one may bind both by a note given in their joint name as a firm for expenses necessarily incurred in the business.⁷

Where creditors are put in possession of the property of their debtor, and carry on the business jointly for their repayment, they are not partners on that account, nor liable as such on an acceptance given by one in the original firm name of the debtor.⁸ But it has been held that the members of an unincorporated club, purchasing bonds for their own use through an authorized agent, are liable as partners for a note given in payment by the agent, so far as they

¹Chitty 73.

²Ballou v. Spencer, 4 Cow. 163 (1825).

³Chitty 58; 1 Daniel 327; 1 Edwards § 94; *Ex parte Peele*, 6 Ves. 604; *Williams v. Thomas*, 6 Esp. 18.

⁴*Williams v. Thomas*, 6 Esp. 18; *Reed v. White*, 5 Esp. 122.

⁵*Offley v. Ward*, 1 Lev. 234; *Tooker's Case*, 2 Co. 67; *Lingan v. Payne*, *Bridgman* 129.

⁶*Ex parte Hunter*, 2 Rose 363.

⁷*Cumpston v. McNair*, 1 Wend. 457 (1828).

⁸*Byles* 46; *Cox v. Hickman*, 8 H. L. C. 268; S. C., 9 C. B. (N. S.) 47.

have authorized or ratified the transaction.¹ Where a partnership is of limited or of special character, knowledge of such limitation may be inferred from circumstances, *e. g.* from publication in the public Gazette; and this will amount to constructive notice to persons dealing with the firm.²

§ 407. **Partnership Name.**—The proper form for the execution of paper by a partnership has been already considered in an earlier part of this work. The proper name of the firm should always be used. If the name be varied, in general, the firm will not be liable without its consent to the name used, unless such name substantially describes the firm.³ Thus, it has been held that a firm, doing business as “Dry & Everett,” will not be liable on a note executed as “Dry and Co.”⁴ Nor a firm, doing business in the name of “John Blurton,” on a note executed in the name of “John Blurton & Co.”⁵ Nor, on the other hand, a firm named “Wm. Smith & Co.,” on an indorsement in the name of “Wm. Smith.”⁶ But an indorsement in the name of one partner “& Co.,” was held, in an early New York case, sufficient to bind a firm which had always been known by the name of another partner “& Co.”⁷

A different name from that actually belonging to the firm and commonly used by it, may be adopted by it and will then be sufficient to bind it, *e. g.* “Elias Malone & Co., Still House,” instead of the regular firm name “Elias Malone.”⁸

¹Ferris *v.* Thaw, 5 Mo. App. 279 (1878).

²Livingston *v.* Roosevelt, 4 Johns. 251 (1809).

³Byles 45; 1 Daniel 331; 1 Parsons 135; Williamson *v.* Johnson, 1 B. & C. 146; 2 D. & R. 281; Faith *v.* Richmond, 11 Ad. & El. 339; S. C., 3 Per. & D. 187; Forbes *v.* Marshall, 11 Exch. 166; Stephens *v.* Reynolds, 5 Hurlst. & N. 513, 29 L. J. Exch. 278.

⁴Byles 45; Sheppard *v.* Dry, Norwich 1840 Cor. Parke, B., affirmed in Q. B.

⁵Kirk *v.* Blurton, 9 M. & W. 284. But see Stephens *v.* Reynolds, 5 H. & N. 513 (1860); MacLae *v.* Sutherland, 3 El. & Bl. 36 (1854).

⁶Alabama Coal, &c., Co. *v.* Brainard, 35 Ala. 476 (1860). But such indorsement will effect an equitable transfer of the interest of the firm, *Ib.* And where the payees named as a firm were named by a fictitious name, rightful title will be presumed in a *bona fide* holder from possession under an indorsement in the assumed name by one of the actual payees, Blodgett *v.* Jackson, 40 N. H. 21 (1859).

⁷Drake *v.* Elwyn, 1 Caines 184 (1803).

⁸Moffat *v.* McKissick, 8 Baxt. 517 (1875). In Voorhees *v.* Jones, 5 Dutch.

And where a fictitious name is used by the firm, this will bind it.¹ So, where a partnership is formed for the publication of a newspaper called "The Opinion," an acceptance given by one partner before the formation of the firm, in his own name, "For the Opinion," for goods purchased for, and afterwards used by, the firm will be binding upon it.² This has been held, too, of a note signed by the individual name of one partner "for the use of" the firm.³ And where a firm consisting of two partners has been dissolved, and a new firm formed under a new name by the addition of a third partner, a bill signed by one of the original partners in the name of the old firm and indorsed by the new partner for the use of the new firm in its new name, will be binding upon the other original partner also as a member of the new firm.⁴

§ 408. **Joint Names.**—It will be sufficient execution by a firm if the joint names of all the partners be signed to the paper.⁵ But where a joint note was made by partners in their individual names payable to their own order, an indorsement by one only was held to be insufficient by the custom of London, notwithstanding that such persons had been found to be partners in the transaction.⁶ And a firm has been held to be bound by the note of one partner given for the firm business in the joint names of all.⁷ So, too, joint

270 (1861), a recovery was had against four partners, where a note had been given signed in the name of only two of them. The matter discussed and decided in this case, however, is the fact of partnership, and, so far as appears in the reported case, the recovery may have been upon the common counts. The name of the two partners had been adopted by formal agreement for the joint business of all four.

¹Thicknesse v. Bromilow, 2 Crompt. & J. 425.

²Markham v. Hazen, 48 Ga. 570 (1873).

³Dow v. Moore, 47 N. H. 419 (1867). For cases showing the manner in which a bill or note should be signed for a firm, see chapter on Form, *supra*.

⁴Bacon v. Hutchings, 5 Bush 595 (1869).

⁵Chitty 72; 1 Daniel 331; 1 Parsons 136; MacLae v. Sutherland, 3 El. & Bl. 36; Norton v. Seymour, 3 C. B. 792; *In re* Warren, Davies 320. But see, *contra*, Buffum v. Seaver, 16 N. H. 160 (1844); Gay v. Johnson, 45 *Ib.* 587 (1864). At least it is not *prima facie* a firm bill or note, Richardson v. Huggins, 23 N. H. 106 (1851); unless it be shown that the firm has no firm name, McGregor v. Cleveland, 5 Wend. 475 (1830).

⁶Carvick v. Vickery, Dougl. 653. As to this case, see Chitty 72.

⁷Byles 45; Cross v. Cheshire, 21 L. J. Exch. 3; Norton v. Seymour, 3 C.

debtors who are not partners will both be bound by a note given in their joint names by one, if the other has promised to pay it with full knowledge of the way in which it was signed.¹ So, a partner may be bound by a note given in the firm business by his partner in their individual names, although he had issued a circular stating that the firm business would be carried on in another name.² And where a partnership note is renewed after dissolution of the firm by a note signed by the individual names of the partners, there will be no change of liability unless specially so intended, and both partners will remain liable.³

In like manner, where a note was signed by two partners in their individual names and by sureties who were induced to sign by a representation that it was for the accommodation of the firm, the proceeds having been used by the firm, the firm will not be discharged by a renewal afterwards by one partner with the same sureties.⁴ So, one partner cannot deny the authority of the other to bind him before the adoption of a firm name, by a note signed by him with their individual names and given for goods purchased by him, which have been entered in the books of the firm and sold for its benefit.⁵ And where an accommodation indorser for a firm has paid a note signed by one partner as maker and by the other as indorser, it has been held that the action will lie against the firm for money paid for its use.⁶ If a note beginning "*I promise*," &c., is signed by the individual names of two or more persons, it may be treated as either joint or several.⁷ But it has been held, on a question of priority

B. 792 (1847); *MacLae v. Sutnerland*, 3 El. & Bl. 34 (1854); *McGregor v. Cleveland*, 5 Wend. 475 (1830); *Filley v. Phelps*, 18 Conn. 301 (1847); *Trowbridge v. Cushman*, 24 Pick. 310 (1836).

¹ *Waite v. Foster*, 33 Me. 424 (1851).

² *Norton v. Seymour*, 3 C. B. 792 (1847).

³ *Maynard v. Fellows*, 43 N. H. 255 (1864).

⁴ *McKee v. Hamilton*, 33 Ohio St. 7 (1877).

⁵ *Kitner v. Whitlock*, 88 Ill. 513 (1878).

⁶ *Thayer v. Smith*, 116 Mass. 363 (1874). See, too, *In re Warren, Davies* 320.

⁷ *March v. Ward*, Peake 130; *Clark v. Blackstock*, Holt 474.

among creditors, that a note signed by the individual names of the partners is not of itself evidence of a partnership debt.¹

§ 409. **Individual Name—When Binding on Firm.**—One partner may bind a partnership by a bill drawn on it in his individual name for a firm debt;² or by an acceptance in his individual name of a bill drawn on the firm;³ or by an indorsement in the firm name of a bill drawn in a fictitious name.⁴ And it is said that, where a note is made payable to two persons by name and indorsed by one in his own name, it will be presumed that the payees are a firm and that the indorser is one of them.⁵ But where the agent of a company drew a bill in his own name upon some of the members, with their consent, to discharge a debt of the company, and the bill was accepted by such drawees and afterward transferred, only those accepting it (and not the company, as such,) were held to be liable on it to the holder.⁶ But if their name had been adopted and used for the company by its consent and with the intention of binding it, it would have been otherwise. So, an agent authorized to make notes for a firm cannot by a note in the individual name of one partner bind either the individual or the firm, unless that name is adopted by the firm.⁷

¹Gay v. Johnson, 45 N. H. 587 (1864).

²Dougal v. Cowles, 5 Day 511 (1813). And such bill is equivalent to an acceptance by the firm, *Ib.*; 1 Parsons 135.

³Bytes 44; Chitty 73; 1 Daniel 332; 1 Edwards § 107; 1 Parsons 135; Mason v. Rumsey, 1 Campb. 384; Jenkins v. Morris, 16 M. & W. 879; Stephens v. Reynolds, 5 H. & N. 513, 29 L. J. Exch. 278; Tolman v. Hanrahan, 44 Wis. 133 (1878); Parnell v. Phillips, 55 Ga. 618 (1876). But see, *contra*, Heenan v. Nash, 8 Minn. 407 (1862), where it is held that such acceptance will not even bind the partner who gives it.

⁴Bytes 45; 1 Parsons 130; Thicknesse v. Bromilow, 2 C. & J. 425. And it seems that an indorsement may be sufficient to effect a transfer, although insufficient to bind the firm as indorsers, Smith v. Johnson, 3 Hurlst. & N. 222 (1858). At least to transfer the equitable title, Alabama Coal Mining Co. v. Brainerd, 35 Ala. 476 (1860).

⁵McConeghy v. Kirk, 68 Penna. St. 200 (1871). The sufficiency of the indorsement in this case was admitted by a subsequent indorsement.

⁶Rogers v. Coit, 6 Hill 322 (1844).

⁷Palmer v. Stephens, 1 Den. 471 (1845). And he may show an adoption of such name by the firm, or even, it seems, by its managing partner for it, *Ib.*

The individual names of the partners may be so used as to give the appearance of a joint or partnership obligation. Thus, where one person has obtained the signature of another without any indication of the character of the second as a surety, and a third person has afterwards signed the note as surety, supposing the first two to be joint principals, the first two being in fact partners, the second signer will have no claim for contribution against the third as a co-surety.¹ Or, if the consideration is a joint one, the contract in the individual names may also be joint. Thus, if one member of the firm makes a note which is indorsed successively by the other members and given for money used by the firm, such indorsers are sometimes presumed to be guarantors, and in such case an alteration by the partner making the note will not discharge the partners indorsing it, but all will be liable as a firm.²

§ 410. **Individual Name—Firm Contract.**—In general, however, a firm will not be bound by a bill or note given by one partner in his own name, even though the proceeds go to the firm or are applied in payment of its debts.³ And this is true although the bill be expressed to be drawn "on account of" the firm.⁴ In many such cases the intention to substitute an individual liability is apparent. Thus, if a partnership debt be paid by the note of an individual partner with outside collateral given to secure it, the firm will be discharged.⁵ So, where several firms are associated in a joint business but not registered as a company, bills of exchange

¹Wells v. Miller, 66 N. Y. 255 (1876).

²Pahlman v. Taylor, 75 Ill. 629 (1874).

³Bytes 44; Chitty 72; 1 Daniel 330; 1 Parsons 130; Siffkin v. Walker, 2 Campb. 308; Emly v. Lye, 15 East 7 (1812); *Ex parte* Emly, 1 Rose 61; Nicholson v. Ricketts, 29 L. J. Q. B. 55; McCauley v. Gordon, 64 Ga. 221 (1879); Logan v. Bond, 13 Ga. 192 (1853); Holmes v. Burton, 9 Vt. 252 (1837); Macklin v. Crutcher, 6 Bush 401 (1869), overruling *pro tanto* Hikes v. Crawford, 4 *Ib.* 19. This is true even though the firm might be liable to suit as for money lent, Emly v. Lye, 15 East 7; Denton v. Rodie, 3 Campb. 493. In this last case the firm had authorized the bill in question, which was drawn on them by one partner for their use, and had recognized and accepted similar bills before their failure.

⁴Cunningham v. Smithson, 12 Leigh 32 (1841).

⁵Adams v. Reid, 56 Ga. 214 (1876).

and acceptances drawn in the joint business, some by one firm and some by another, will bind the firms signing or accepting them and not the associated firms.¹ So, where a note payable on demand is given by one partner after the absconding of the other, in renewal of a note payable at a future time, the absconding partner will not be bound by the renewal.²

But it has been held that if a note is given by one partner in his own name for money loaned to the firm, and the proceeds are received and used by the firm, it will be bound by the note.³ This liability extends, however, only to cases where, if the firm name has not been used, credit has at least been given to the firm.⁴ A firm will be liable on such paper where the benefit has been received by it and the credit given to it.⁵ And in such case an indorser, who has been obliged to pay the note, may enforce a lien for the claim against partnership assets in his hands.⁶ Even where a firm business has been carried on in the name of one partner, it has been held that indorsements in his name will only bind the firm where they were received as its indorsements upon a representation to that effect and were made in the firm business.⁷ So, where a note has been given by one partner for corn sold to both, on a representation by the maker that he gave the note on the partnership account, both have been held liable on it.⁸

A firm may become liable on paper executed in its name, though running in the words "I promise," &c.⁹ Again, two

¹*In re Adansonie Fibre Co.*, L. R. 9 Ch. 635 (1874).

²*Whitman v. Leonard*, 3 Pick. 177 (1825).

³*Whitaker v. Brown*, 16 Wend. 505 (1836).

⁴*National Bank of Salem v. Thomas*, 47 N. Y. 15 (1871).

⁵*Puckett v. Stokes*, 58 Tenn. 442 (1873). See, too, *In re Warren, Davies*, 320, where it is said that such name will be presumed to have been taken by choice by the partners for their use. But this presumption may be rebutted by proof to the contrary, *Ib.*

⁶*Foster v. Hall*, 4 Humph. 345 (1843).

⁷*United States Bank v. Binney*, 5 Mason 176 (1828).

⁸*Seekell v. Fletcher*, 53 Iowa 330 (1880); *Ontario Bank v. Hennessy*, 48 N. Y. 545 (1872); *Woodward v. Winship*, 12 Pick. 430 (1832).

⁹*Doty v. Bates*, 11 Johns. 544 (1814). Especially where the note was signed

partners may become severally liable upon a joint and several note executed in the firm name by one and ratified afterwards by a confession of judgment by the other.¹

§ 411. **Individual Name Same as Firm Name.**—Where the name of an individual partner is also the name of the firm, and the bill or note in question is given in such name and for the benefit of the firm, all the partners will of course be liable on it.² So, where the firm business is carried on in the name of one partner, and a bill addressed to such name is accepted by the other partner in his own name, and the proceeds go to the partnership business, the firm will be bound by the acceptance.³ If a firm without indorsement holds a note made payable to one of its members and given for money loaned by the firm, it will not be such a *bona fide* holder for value as to exclude the defense of illegality of consideration.⁴ But where a note is given to one partner, and suit is brought on it by him for the use of the firm, it is unnecessary to join the other partners as plaintiffs, and a counterclaim against the firm cannot be set up in defense.⁵ And the mere fact of money obtained on one partner's individual note being applied to the business of the firm will not make the note a partnership debt, but a dormant partner will be liable in such case on the common counts.⁶ Where

"For A. B. & Co., A.," Lord Galway *v.* Matthews, 1 Campb. 403; Smith *v.* Jarves, 3 Ld. Raym. 1484; *In re* Clarke, 14 M. & W. 469. And it has been held in such case that the holder might sue the individual signer or the firm, Hall *v.* Smith, 1 B. & C. 407; S. C., 2 Dowl. & R. 584; March *v.* Ward, Peake 130; Clark *v.* Blackstock, Holt. C. N. P. 474. But as to this point, see *contra*, *In re* Clark, 14 M. & W. 469, overruling Hall *v.* Smith, 1 B. & C. 407; S. C., 2 D. & R. 504 (1845). And the holder of such note cannot prove his claim in bankruptcy against the separate estate of the individual signer, *Ex parte* Christie, 3 Mont. D. & DeG. 736.

¹ Sherman *v.* Christy, 17 Iowa 322 (1864); Easley *v.* Christy, *Ib.*

² Byles 44; Chitty 56, 73; 1 Daniel 335; 1 Parsons 131; South Carolina Bank *v.* Case, 8 B. & C. 427; S. C., 2 M. & Ry. 459; Nicholson *v.* Ricketts, 29 L. J. Q. B. 55; Smith *v.* Craven, 1 Cromp. & J. 507. See, too, Swan *v.* Steele, 7 East 210; *Ex parte* Bolitho, 1 Buck 100; Thicknesse *v.* Bromilow, 2 C. & J. 425. So, also, if made in the firm business, Buckner *v.* Lee, 8 Ga. 285 (1850).

³ Stephens *v.* Reynolds, 5 H. & N. 513 (1860).

⁴ Norton *v.* Pickens, 21 La. An. 575 (1869).

⁵ Mynderse *v.* Snook, 1 Lans. 488 (1869).

⁶ Graeff *v.* Hitchman, 5 Watts 454 (1836).

two partners transact business in the name of one and give notes as such in that business, the surviving dormant partner may be sued by an indorsee after the death of the partner whose name was used.¹ If the bank account of a firm is kept in the name of one partner, this is so far an adoption of that name by the firm and his check will bind the firm.² But where a firm transacts business in the individual name of one, and a bill is drawn in that name and accepted by the other in his individual name, and both partners become bankrupt, their separate estates will be liable to a holder not knowing of the partnership, and not their joint estate.³

§ 412. **Presumption as to Individual Name.**—Where the name of an individual partner is the same as that of the firm, the paper executed in such name is presumptively that of the individual and not of the firm.⁴ But this presumption may be rebutted by parol evidence.⁵ And a contrary presumption has been made in the case of a loan to one who carried on his partnership and private business in the same individual name and gave his check in payment.⁶ Bills and notes given to a person carrying on business in such a way are presumably made to him individually.⁷ Although it was formerly held that where the individual and the firm name were the same, the holder of paper given in such name might elect between them.⁸ And where two firms have the same

¹ *Scott v. Colmesnil*, 7 J. J. Marsh. 416 (1832). See, too, *In re Warren*, Davies 320.

² *Crocker v. Colwell*, 46 N. Y. 212 (1871).

³ *Ex parte* Husbands, 2 Glyn & J. 4.

⁴ *Chitty* 56; *Bytes* 49; 1 *Daniel* 334; 1 *Edwards* § 107; *Ex parte* Bolitho, 1 *Buck* 100; *Wintle v. Crowther*, 1 *Crompt. & J.* 316; *S. C.*, 1 *Tyrw.* 210; *Furze v. Sharswood*, 2 *Q. B.* 388; *Bank of Rochester v. Monteath*, 1 *Denio* 402 (1845); *Manufacturers' Bank v. Winship*, 5 *Pick.* 11 (1827); *Mercantile Bank v. Cox*, 38 *Me.* 500 (1854); *National Bank v. Ingraham*, 58 *Barb.* 290 (1870). But where the individual partner carried on no separate business, a contrary presumption was had in *Yorkshire Banking Co. v. Beatson*, *L. R.* 5 *C. P. D.* 109 (*Ct. App.* 1880), affirming *L. R.* 4 *C. P. D.* 204. In this case the note was proved to have been authorized by the firm and made in its business.

⁵ *Trowbridge v. Cushman*, 24 *Pick.* 310 (1836).

⁶ *Mifflin v. Smith*, 17 *Serg. & R.* 165 (1828).

⁷ 1 *Parsons* 131; *Boyle v. Skinner*, 19 *Mo.* 82 (1853).

⁸ *Bytes* 45; *Hall v. Smith*, 1 *B. & C.* 407; *S. C.*, 2 *D. & R.* 484; *March v. Ward*, *Peake* 130; *Wilks v. Back*, 2 *East* 142.

name, and a bill of exchange is given by one who is a member of both firms, it has been held that the holder may elect which of the two firms he will look to for payment.¹

§ 413. **Partnership Paper for Individual Debts.**—The authority which members of a firm have to bind one another by the execution of commercial paper extends only to the firm business, although there is often an implied authority in favor of *bona fide* holders of such paper who are ignorant of the original consideration for it. The general principle, however, is that no member of a firm can bind the other by giving or indorsing commercial paper in its name for an individual debt or purpose of his own.² And an indorser of a note may avail himself of the defense that the partner making it did so for an individual debt of his own.³ If a note is given to a firm for money due one partner, with a concurrent contemporaneous agreement in writing between that partner and the maker of the note for its payment by house rent to said partner, such agreement must be construed with the note and forms one contract with it, binding as well upon the firm as upon the individual partner making it.⁴ But one partner may not bind his firm by agreeing that a note payable to the firm shall be credited on an individual account against him.⁵ If, however, one partner indorses on a note which belongs to the firm a part payment in satisfaction of his individual debt, the firm cannot in an action at

¹Byles 49; Chitty 58; Baker v. Charlton, Peake 80; McNair v. Fleming, Mont. 32; Swan v. Steele, 7 East 210. But see *Ex parte* Buckley, 14 M. & W. 469. And such right to elect may be often controlled by the circumstances under which the paper is taken, 1 Parsons 137.

²Babcock v. Stone, 3 McLean 172 (1843); Union Nat. Bank v. Underhill, 21 Hun 178 (1880); Gale v. Miller, 54 N. Y. 536 (1874), affirming 1 Lans. 451 (1868); 44 Barb. 420 (1865); Atkin v. Berry, 1 B. J. Lea 91 (1878); Mechanics', &c., Ins. Co. v. Richardson, 33 La. An. 1308 (1881); Mutual Nat. Bank v. Richardson, *Ib.* 1312 (1881); Lime Rock, &c., Ins. Co. v. Treat, 58 Me. 415 (1870). See, too, *Ex parte* Goulding, 2 Glyn. & J. 118; *Ex parte* Thrope, 3 Mont. & Ayr. 716. And if the individual partner signing such a note die, his representatives and not the surviving partners will be liable, Lill v. Egan, 89 Ill. 609 (1878).

³Williams v. Walbridge, 3 Wend. 415 (1829); Livingston v. Hastie, 2 Caines 246; Rolston v. Click, 1 Stew. 526 (Ala. 1828); Hagar v. Mounts, 3 Blackf. 57 (1832).

⁴Bradley v. Marshall, 54 Ill. 173 (1870).

⁵Harper v. Wringley, 48 Ga. 495 (1873).

law disregard or rescind such indorsement and recover the whole amount of the debt.¹ A note by one partner in the name of the partnership for money collected by him individually will not bind the firm at suit of the payee.² But if the money, so collected by him as agent of the payee of the note, had been borrowed by him and applied to the business of the firm, his note in the firm name would bind it; the presumption of a firm debt arising from the form of the note, and the burden not falling in the first instance upon the holder to show either the application of the money or the assent of the firm.³

§ 414. **Defense—When Admissible.**—If a partnership note be given for the individual debt of one partner, the firm may avail itself of that defense against a purchaser of the note after maturity.⁴ And, in general, such defense can be set up against any holder who takes the instrument with knowledge of the fact.⁵ But unless the holder knew or had reason to believe that the partner giving such paper was abusing his authority for his own benefit, the firm will be bound by it.⁶ If the partner had signed his individual name to a note before that of the firm, this is proper evidence for the jury to consider in determining whether the holder had such reason to know the actual circumstances of the case.⁷

¹Craig v. Hulschizer, 5 Vroom 363 (1871). But a receipt by one of the firm to which the note belongs for his individual debt to the maker has been held not to be binding upon partnership creditors, Mayer v. Garber, 53 Iowa 689 (1880).

²Hickman v. Reineking, 6 Blackf. 387 (1843).

³Whitaker v. Brown, 16 Wend. 505 (1836).

⁴Whitaker v. Brown, 11 Wend. 75 (1833).

⁵Wintle v. Crowther, 1 Crompt. & J. 316; Joyce v. Williams, 14 Wend. 141 (1835); Livingston v. Roosevelt, 4 Johns. 251 (1809); Lansing v. Gaine, 2 Ib 300 (1807); Lanier v. McCabe, 2 Fla. 32 (1848); Noble v. McClintock, 2 Watts & S. 152 (1841); Gansevoort v. Williams, 14 Wend. 133 (1835); Huntington v. Lyman, D. Chip. 438 (1824); Baird v. Cochran, 4 Serg. & R. 397 (1818); Weed v. Richardson, 2 Dev. & B. 535 (1837); Williams v. Gilchrist, 11 N. H. 535 (1841); Taylor v. Hillyer, 3 Blackf. 433 (1834); Sherwood v. Snow, 46 Iowa 481 (1877). And so where a creditor of one partner knowingly receives goods of the firm in payment, he is liable for their full value to the partnership, Dob v. Halsey, 16 Johns. 34 (1819).

⁶Cotton v. Evans, 1 Dev. & B. Eq. 284 (1835); Wagner v. Freschl, 56 N. H. 495 (1876); Deitz v. Regnier, 27 Kans. 94 (1882); Windham Co. Bank v. Kendall, 7 R. I. 77 (1861).

⁷Sherwood v. Snow, 46 Iowa 481 (1877).

§ 415. **Consent of Partners—Presumption.**—If a firm note is given for the individual debt of a partner with the consent of the firm, it will, of course, be binding on all the partners consenting.¹ And it seems that a subsequent promise of the other partner to pay the note, made to one who had taken it with full knowledge of the facts, would be sufficient to bind the firm without any new consideration.² The consent of the firm to the giving or indorsing of such paper may be implied.³ And such consent may be implied from the payment of money by one partner into the hands of the partner drawing such bill as firm assets and for the purpose of meeting the bill.⁴

But where a bill of exchange is given in the name of a firm for the individual debt of the partner giving it, it will be presumed to have been given without the consent of the other partners, and if without their consent, then in fraud of them.⁵ Where the character of the paper as accommodation paper of this sort appears and is known to the purchaser, or where he has reason to know it from the nature of the transaction, the burden of proof will be upon him to show authority on the part of the firm or its subsequent assent.⁶ And the assent of the others in such case must be

¹ *Lavery v. Burr*, 1 Wend. 529 (1828); *Lanier v. McCabe*, 2 Fla. 32 (1848); *Noble v. M'Clintock*, 2 Watts & S. 152 (1841).

² *Commercial Bank v. Warren*, 17 N. Y. 577 (1857).

³ *Gansevoort v. Williams*, 14 Wend. 133 (1835).

⁴ *Davis v. Smith*, 27 Minn. 390 (1880).

⁵ *Byles* 47; 1 *Parsons* 126; 1 *Daniel* 336; *Shirreff v. Wilks*, 1 East 48; *Green v. Deakin*, 2 Stark. 347; *Arden v. Sharpe*, 3 Esp. 524; *Richmond v. Heapy*, 1 Stark. 202; *Barber v. Backhouse*, Peake 61; *Wallace v. Kelsall*, 7 M. & W. 264; *Jones v. Yates*, 9 B. & C. 532; *Gordon v. Ellis*, 7 Man. & G. 607; *Jacaud v. French*, 12 East 317; *Laveson v. Lane*, 13 C. B. (N. S.) 278; *Foot v. Sabin*, 19 Johns. 154 (1821); *Kemeys v. Richards*, 11 Barb. 312 (1851); *Mecutchen v. Kennady*, 3 Dutch. 230 (1858); *Davis v. Smith*, 27 Minn. 390 (1880); *Lavery v. Burr*, 1 Wend. 531 (1828); *Williams v. Walbridge*, 3 *Ib.* 415 (1829); *Davenport v. Runlett*, 3 N. H. 386 (1826); *Rolston v. Click*, 1 Stew. 526 (Ala. 1828).

⁶ *Bank of Commerce v. Selden*, 3 Minn. 155 (1859); *Elliott v. Dudley*, 19 Barb. 326 (1855); *Bank of Vergennes v. Cameron*, 7 Barb. 143 (1849); *Rogers v. Batchelor*, 12 Pet. 221 (1838); *Smyth v. Strader*, 4 How. 404 (1846). But the fact that a note payable to the firm of A. & B. was indorsed by the partner A. to another firm, A., B. & Co., and in its name forthwith to the holder, will not throw on the holder the burden of showing the assent of B. although the holder saw the indorsements made, the former firm being at

shown clearly.¹ A mere subsequent promise on their part to pay the bill or note, without knowing the circumstances under which it was issued, will not amount to assent.² Nor will a waiver on their part of protest for non-payment, or a failure to disclaim promptly the liability of the firm, amount to such assent or to a ratification of the paper.³ Where a note is made by a member of a firm for his individual purchases, and indorsed by him with a guaranty in the name of the firm, it will not bind the firm in the hands of a holder who was ignorant of the circumstances by reason of his own negligence in the matter.⁴ If a firm has given its assent to the execution of partnership paper in payment of an individual debt of one partner, this consent is revocable until actually used and the paper delivered.⁵

Where a partnership bill or note is given for the individual debt of one partner, the burden of proof is upon the defendant to show this fact.⁶ Whether such an instrument was given for firm debt or not, is a question of fact for the jury.⁷ So, it is a question of fact whether a bill of exchange, drawn upon a firm and accepted in its name by one partner, for goods sold him outside of the line of business of the firm, has been accepted with the consent of the firm.⁸ Where a note is given in this manner by one partner for money borrowed by him, the firm will not be rendered liable by the

the time indebted to the latter, and B. saying to the plaintiff that the note was a good collateral, *Walker v. Kee*, 16 So. Car. 76 (1881).

¹*Joyce v. Williams*, 14 Wend. 141 (1835). So, if given for the debt of another firm having a partner in common with the first, *Tyree v. Lyon*, 67 Ala. 1 (1880). Mere knowledge and failure by the other partner to express his dissent is not sufficient, *McKinney v. Brights*, 16 Penna. St. 399 (1851); *Elliott v. Dudley*, 19 Barb. 326; *Reubin v. Cohen*, 48 Cal. 545 (1874).

²*Wilson v. Forde*, 20 Ohio St. 89 (1870).

³*Marsh v. Thompson National Bank*, 2 Ill. App. 217 (1878).

⁴*New York, &c., Ins. Co. v. Bennett*, 5 Conn. 574.

⁵*National Bank of Jacksonville v. Mapes*, 85 Ill. 67 (1877).

⁶*Whitaker v. Brown*, 16 Wend. 505 (1836); *Deitz v. Regnier*, 27 Kans. 94 (1882); *Hamilton v. Summers*, 12 B. Mon. 11 (1851); *Barrett v. Swann*, 17 Me. 180 (1840); *Ensminger v. Marvin*, 5 Blackf. 210 (1839); *Hickman v. Kunkle*, 27 Mo. 401 (1858); *Magill v. Merrill*, 5 B. Mon. 168 (1844).

⁷*Duran v. Ayer*, 67 Me. 145 (1877).

⁸*Chitty* 61; *Wood v. Holbeck*, May 28th, 1826, cer. Abbott, C. J., at Guildhall.

mere fact that he has purchased and furnished to it a large amount of goods which have been credited to him on its books.¹

§ 416. **Defense—When Inadmissible.**—In the hands of a *bona fide* holder for value before maturity, it is no defense that the bill or note in question has been given for the individual debt or advantage of one partner.² In all such cases the ostensible power of every partner raises a sufficient implication to bind the firm, and without such implication it would be impossible to carry on the ordinary business of a mercantile firm. This applies properly only to commercial paper taken in the regular course of business.³ In the hands of such a holder it is immaterial that the paper was given without the knowledge of the other partners, and that the proceeds of it were actually received and used by the partner giving it.⁴

Beyond the protection afforded to such a holder, a partner cannot render his firm liable for a note given by him in its name for his individual debt by including in the amount of the note a debt of the firm.⁵ In such case the firm would be liable *pro tanto* only.⁶ This is so also where a note is given for a firm debt, part of which accrued before a new partner was taken into the firm and part afterwards. In such case even a *bona fide* holder can recover against the new partner with the others only for the latter part of the debt.⁷

¹Clay v. Cottrell, 18 Penna. St. 408 (1852).

²Byles 46; Chitty 54; Swan v. Steele, 7 East 210; Ridley v. Taylor, 13 Ib. 175; Jacaud v. French, 12 Ib. 322; Arden v. Sharpe, 2 Esp. 524; Wells v. Mastermann, Ib. 731; Lane v. Williams, 2 Vern. 277; Baker v. Charlton, Peake 80; Babcock v. Stone, 3 McLean 172 (1843); Miller v. Manice, 6 Hill 114 (1843); Waldo Bank v. Lumbert, 16 Me. 416 (1839); Duncan v. Clark, 2 Rich. 587 (1846); Knapp v. McBride, 7 Ala. 19 (1844); Onondaga Co. Bank v. DePuy, 17 Wend. 47 (1837); Faler v. Jordan, 44 Miss. 283 (1870); Parker v. Burgess, 5 R. I. 277 (1858); Kellogg v. Fancher, 23 Wis. 21 (1868); Blodgett v. Weed, 119 Mass. 215 (1875); Murphy v. Camden, 18 Mo. 122 (1853). But this would be a good defense in favor of a dormant partner not known to the purchaser at the time of taking the paper, Miller v. Manice, *supra*; Yorkshire Banking Co. v. Beatson, L. R. 4 C. P. D. 204 (1879).

³Bascom v. Young, 7 Mo. 1 (1841); Hawes v. Dunton, 1 Bailey 146 (1829).

⁴Emerson v. Harimon, 14 Me. 271 (1837).

⁵King v. Faber, 22 Penna. St. 21 (1853).

⁶Gamble v. Grimes, 2 Ind. 392 (1850).

⁷Guild v. Belcher, 119 Mass. 257 (1878).

Although a bill of exchange is known by the holder to have been given in part for an individual debt of one partner, even a secret partner will be liable on the bill so far as regards the rest of the debt secured by it, notwithstanding that the holder had no knowledge of the existence of a dormant partner.¹ Where, however, a firm note is made for the individual debt of a partner in a partnership which was not commercial in its character, it will not bind the firm even in the hand of a *bona fide* holder for value, as there is no general authority implied in such a case to give such paper.² On the other hand, a note given for the individual debt of one partner in a commercial firm will bind the firm at suit of a holder without notice and for value, notwithstanding notice of such fact to the original payee.³

§ 417. **Burden of Proving Notice.**—In all cases where a firm seeks to avail itself of such defense, the burden is on it to prove notice of the fact.⁴ In like manner, a new partner can relieve himself from liability on a note given for debts of the old firm only by proving that the holder knew, or had reason to know, that the firm name was being improperly used in the transaction.⁵ Where a partnership bill payable to the order of the drawer is drawn by one partner on the firm, and accepted by himself, and indorsed and negotiated in the firm name, this has been held to be sufficient notice of the fact that it was given for the individual benefit of such partner.⁶ So, where a note is made by one partner individually, and indorsed by him in the firm name over the indorsement of the payee, this is sufficient notice of the ac-

¹Wintle v. Crowther, 1 Crompt. & J. 316. But see, as to the value of this case, 1 Parsons 129. To the same effect, however, see Ellston v. Deacon, L. R. 2 C. P. 20 (1866); Wilson v. Forde, 20 Ohio St. 89 (1870).

²Crosthwait v. Ross, 1 Humph. 23 (1839); Cocke v. Branch Bank, 3 Ala. 175 (1841); Gray v. Ward, 18 Ill. 32 (1856).

³Parker v. Burgess, 5 R. I. 277 (1858); Wright v. Brosseau, 73 Ill. 381 (1874); Atlantic State Bank, &c., v. Savery, 82 N. Y. 291 (1880).

⁴Miller v. Manice, 6 Hill 114 (1843); Whitaker v. Brown, 16 Wend. 505 (1836).

⁵Abpt v. Miller, 5 Jones 32 (1857).

⁶Cooper v. McClurkan, 22 Penna. St. 80 (1853).

commodation character of the firm indorsement.¹ So is a memorandum made on a partnership note to the effect that it was given as security for the note of one partner.² But such notice is not presumed from the fact of the note being made in the name of one partner payable to his firm, and indorsed by another partner in the firm name with the date and rate of interest left blank, or from the fact that these were filled in by the partner using the note when he delivered it to the plaintiff.³

§ 418. Between the original parties to a bill or note, the fact that it was given and received in payment of the individual debt of one partner is sufficient notice of his want of authority to bind the firm.⁴ So, if the holder of the note of an individual partner takes a firm note in renewal of it, he has notice of such partner's want of authority and cannot recover against the firm.⁵ In opposition to the foregoing view it has been held that the mere circumstance of taking a partnership bill or note for the individual debt of one partner is not sufficient notice of his want of authority, as he may have a credit in his favor against the firm, and the burden of proving a fraud on the partnership and actual notice to the holder have been held to fall upon the firm, even in such a case.⁶ It is said, however, that the taking of the firm

¹National Bank of Commonwealth v. Law, 127 Mass. 72 (1879), Gray, C. J., saying: "The defendant's name being upon the back of the note above that of the payee's, it was apparent upon the note itself, read in the light of the statute, which every one was bound to know, that the liability of the partnership was but conditional and secondary, and therefore that *prima facie* at least their signature was affixed for the accommodation and benefit of" the maker.

²National Security Bank v. McDonald, 127 Mass. 82 (1879). And in such case the other partners will not be liable without evidence of their consent, *Ib.*

³Wait v. Thayer, 118 Mass. 473 (1875).

⁴Heath v. Sansom, 2 B. & Ad. 291; Barber v. Backhorn, Peake 61; *Ex parte* Agace, 2 Cox 312; *Ex parte* Goulding, 2 Glyn & J. 118; Meeutchen v. Kennady, 3 Dutch. 230 (1858); Gansevoort v. Williams, 14 Wend. 133 (1835); Hagar v. Mounts, 3 Blackf. 57 (1832); Williams v. Gilchrist, 11 N. H. 535 (1841); Wagnon v. Clay, 1 A. K. Marsh. 257 (1818); Wells v. Siess, 24 La. An. 178 (1872); Livingston v. Hastie, 2 Caines 246 (1804). As to this presumption and also as to the presumption, if any, from the handwriting of one partner, see Hope v. Cust, 1 East 53.

⁵Union Nat. Bank v. Underhill, 21 Hun 178 (1880).

⁶*Ex parte* Bonbonus, 8 Ves. 542; Houlditch v. Nias, 8 Price 689; Hender-

paper for such a consideration is at least presumptive evidence of fraud or of gross negligence amounting to fraud.¹ But if the circumstances of the case are such as to make it reasonable to believe that the consent of the firm was given to such paper, the firm must prove the fraud in its own defense.²

It has been held even, that taking such an instrument from one partner without consulting the others implies sufficient notice of his want of authority, where the whole paper is in his handwriting.³ So, if a note has been indorsed in the partnership name in a transaction which is clearly outside of the firm business, the firm will not be liable upon it.⁴

Where the firm has proved in defense to such paper that it was given for the individual debt of one or more partners, the burden of proof is then on the holder to show himself a *bona fide* holder for value before maturity.⁵ Where a note is given by one partner in the firm name for his own debt or benefit to one who knows the circumstances, but transfers it to a *bona fide* holder before maturity in order to cut off such defense, such indorser thereby becomes liable for the fraud perpetrated by him upon the partner not consenting to the paper; and such liability is not to the firm, but to the partner injured, and is not a right of action belonging to the firm which passes by a general assignment of the firm debts.⁶

son v. Wild, 2 Campb. 561. See, too, Ridley v. Taylor, 13 East 175, where the partnership bill, however, appeared to have been drawn eighteen days before and for a larger amount than the particular debt in question. In this case Lord Ellenborough, C. J., said: "If this were distinctly the case of a pledging by one partner of a partnership security for his own separate debt without the authority of the other partners; or if there existed in this case evident covin between one partner and the holder of the partnership securities, upon which the action is brought, in order to charge the other partner without his knowledge or consent, either expressed or implied, for the private advantage of the parties to such covinous agreement, we should have no hesitation to pronounce a bill drawn and indorsed under such circumstances void in the hands of the covinous holders * * * but upon the facts stated, such does not distinctly appear to us to be the case."

¹Davenport v. Runlett, 3 N. H. 386 (1826); Eastman v. Cooper, 15 Pick 276.

²Frankland v. M'Gusty, 1 Knapp P. C. C. 274 (1830).

³Chitty 60; Hope v. Cust, cited 1 East 53.

⁴Newman v. Richardson, 9 Fed. Rep. 865 (1881).

⁵Wright v. Brosseau, 73 Ill. 381 (1874).

⁶Calkins v. Smith, 48 N. Y. 614 (1872).

§ 419. **Accommodation Paper by Partners.**—The power of partners to bind one another by commercial paper will not extend to indorsements or other contracts for the accommodation of a third person. And the fact that the paper in question has been given for accommodation is a good defense against any holder who has taken it with knowledge of that fact.¹ So, a partner has no power to give a bill or note in the firm name as guarantor for a purpose in no way connected with the partnership business.² So, a note given by one in the firm name as surety and not in the course of the firm's business, is not binding upon it.³ It has been held that one partner using the firm name in such a way without consent of the others, is liable as though he had signed his individual name.⁴ But where an acceptance has been given by the acting partner in a firm in consideration of similar acceptances for the firm by the drawer of the bill, such acceptance will be binding upon the firm.⁵

Where the word "surety" is added to the signature, this is presumptive evidence of its accommodation character.⁶ And where one partner has indorsed a note as surety for the maker in the partnership name, the burden of proof is on the holder to rebut the presumption that the indorsement is given in fraud of the partnership.⁷ So, where the individ-

¹ *Wilson v. Williams*, 14 Wend. 146 (1835); *Bank of Rochester v. Bowen*, 7 *Ib.* 158 (1831); *Boyd v. Plumb*, *Ib.* 307 (1831); *Stall v. Catskill Bank*, 18 *Ib.* 466 (1837); *Sweetser v. French*, 2 Cush. 309 (1848); *Bloom v. Helm*, 53 Miss. 21 (1876); *Foot v. Sabin*, 19 Johns. 154 (1821); *Laverty v. Burr*, 1 Wend. 528 (1828); *Andrews v. Planters' Bank*, 7 Sm. & M. 192 (1846); *Chenoweth v. Chamberlain*, 6 B. Mon. 60 (1845); *Rollins v. Stevens*, 31 Me. 454 (1850); *Lang v. Waring*, 17 Ala. 145 (1850); *Heffron v. Hanaford*, 40 Mich. 305 (1879); *Whaley v. Moody*, 2 Humph. 495 (1841); *Bank of Tennessee v. Saffarans*, 3 Humph. 597 (1842); *Chazournes v. Edwards*, 3 Pick. 5 (1825); *Long v. Carter*, 3 Ired. 238 (1842); *Vredenburg v. Lagan*, 28 La. An. 941 (1876). And see an article on this subject in 15 Cent. L. J. 222. And this is true even where goods have been sold on the strength of the accommodation indorsement, *Wilson v. Williams*, *supra*.

² *Marsh v. Thompson Nat. Bank*, 2 Bradw. 217 (1878); *Davis v. Blackwell*, 5 *Ib.* 32 (1879); *Spurk v. Leonard*, 9 *Ib.* 174 (1831).

³ *Long v. Carter*, 3 Ired. 238 (1842); *New York Firemen Ins. Co. v. Bennett*, 5 Conn. 574 (1825).

⁴ *Silvers v. Foster*, 9 Kans. 56 (1872).

⁵ *Gano v. Samuel*, 14 Ohio 592 (1846).

⁶ *Boyd v. Plumb*, 7 Wend. 309 (1831).

⁷ *Darling v. March*, 22 Me. 184 (1842).

ual note of one partner is guaranteed by the firm, this is of itself notice that the paper has not been signed in the firm business, and the purchaser takes it at his peril.¹ So, if a partner gives a blank acceptance in the firm name, it is notice of his want of authority.² But where a blank draft is signed by a firm, the drawer's authority is implied, as we have seen, to fill it up and negotiate it, and the fact that it is filled up by the holder at the time of the transfer and in the transferee's presence, is no evidence of its being accommodation paper.³

§ 420. **Consent to Accommodation Binds Firm.**—Accommodation paper given by one partner in the firm name with the consent of the others, either express or implied, binds the firm.⁴ Thus, notes of the firm given by one partner, in settlement of a previous liability of the firm as surety for another, which it had recognized by an agreement to give the notes in settlement, will be binding upon the firm.⁵ It is not necessary that such paper should be executed under a special authority, but any assent or promise to pay given afterward by the other partners is sufficient to bind them.⁶ A subsequent conversation, in which the other partners did not deny their liability upon such paper, but said that it would have to take its course and be disposed of like other indebtedness of the firm, is material to show their liability and waiver of notice of protest.⁷ And it has been held that the consent of a firm to such accommodation paper will include a renewal of it after dissolution of the firm.⁸ A partner who discovers that his copartner is in the habit of im-

¹ *Marsh v. Thompson Nat. Bank*, 2 Bradw. 217 (1878).

² *Hogarth v. Latham*, 39 L. T. R. 75 (1878).

³ *Chemung Canal Bank v. Bradner*, 44 N. Y. 680 (1871).

⁴ *First National Bank of Fort Dodge v. Breese*, 39 Iowa 640 (1874); *Laverty v. Burr*, 1 Wend. 531 (1828). See, too, *Sweetser v. French*, 2 Cush. 309 (1848). But such consent must clearly appear, *Wilson v. Williams*, 14 Wend. 146 (1835).

⁵ *Bloom v. Stern*, 23 La. An. 747 (1871); *Star Wagon Co. v. Swezey*, 52 Iowa (1879); *S. C.*, 59 *Ib.* 609 (1882).

⁶ *Butler v. Stocking*, 8 N. Y. 408 (1853).

⁷ *First Nat. Bank of Dubuque v. Carpenter*, 34 Iowa 433 (1872).

⁸ *Dundass v. Gallagher*, 4 Penna. St. 205 (1846).

properly drawing, accepting or indorsing in the firm name for the accommodation of others should file a bill in equity to prevent further acts of the sort by injunction.¹

§ 421. **Burden of Proving Consent.**—Where it appears that the firm paper has been given by one partner as accommodation paper, the burden of proof rests on the holder to show original authority or subsequent ratification by the firm.² The consent of the firm to the giving of such accommodation must be clearly proven.³ And the mere fact that the other partner had in one instance seen a notice of the maturing of a bill indorsed by the firm name as sureties, and had not denied the authority of the other partner to use the firm name in that manner, coupled with the fact that such notices were often left at the store of the firm, will not be sufficient to hold the firm on a note signed by it as sureties without other proof or knowledge of that fact.⁴ Nor is it sufficient that the holder has made inquiries before taking the paper at the bank where the firm did its business.⁵ And even proof of a habit of giving accommodation indorsements will not be evidence of the firm's assent to an accommodation note given by one partner.⁶

§ 422. **Accommodation—When Binding—Bona Fide Hold-**

¹ *Master v. Kirton*, 8 Ves. 74; *Ryan v. Mackmath*, 3 Bro. C. C. 15; *Newsome v. Coles*, 2 Campb. 619; *Lawson v. Morgan*, 1 Price 303.

² *Sweetser v. French*, 2 Cush. 309 (1848); *Tompkins v. Woodyard*, 5 W. Va. 216 (1872). So, if such note was given as guarantor or surety for another and the fact was known to the purchaser, the burden is on him to prove authority from the other partners, *Spurck v. Leonard*, 9 Bradw. 174 (1881). And such authority may be presumed from the course of business of the firm, *Sweetser v. French*, *supra*.

³ *Butler v. Stocking*, 8 N. Y. 408 (1853); *Foot v. Sabin*, 19 Johns. 154 (1821). And it is not conclusive evidence of such authority that blanks for date and rate of interest were left in the note and filled in when it was indorsed and negotiated by such partner, *Wait v. Thayer*, 118 Mass. 473 (1875); *Hendrie v. Berkowitz*, 37 Cal. 113 (1869).

⁴ *Andrews v. Planters' Bank*, 7 Sm. & M. 192 (1846). The fact that the note was made by and payable to the individual partner, and indorsed by him in his own name and in that of his firm, is not sufficient notice to destroy the *bona fide* character of the purchaser, *Redlow v. Churchill*, 73 Me. 146 (1882). And the fact that the note was purchased from a broker will not raise the presumption that he was the agent of the maker, *Ib.*

⁵ *Pooley v. Whitmore*, 10 Heisk. 629 (1873).

⁶ *Early v. Reed*, 6 Hill 12 (1843).

ers.—Where, however, accommodation paper is given by one partner and the benefit is received by the firm, it has been held to be binding on the firm.¹ And if a bill is drawn by one partner on his firm and accepted by them apparently in the regular course of business and discounted for value, it will be binding upon the firm.²

And, in general, it is no defense against a *bona fide* holder for value before maturity that the paper was given for accommodation by one partner without the consent of the others.³ But if the transfer of such paper is under circumstances calculated to arouse suspicion, the holder will not be regarded as a *bona fide* purchaser and will be subject to the defense that the paper was given for accommodation without the consent of the firm.⁴ And where a partnership note was drawn by one partner for his own accommodation and transferred to an unincorporated bank, and the partner who made the note was also a partner in the bank and had received money for the express purpose of taking up the note and had misapplied it, the bank was held to be bound by his knowledge of the facts.⁵

Where partnership paper is proved to have been given for accommodation, the burden of showing his good faith is then shifted to the holder.⁶ And where a bill has been discounted for the drawer, payable to his firm and indorsed in its name, it will be presumed to have been given for accommodation.⁷ And this is true especially where the transaction was not within the scope of the partnership business or apparently authorized by any previous habit of indorsing such paper.⁸

¹ Langan v. Hewett, 3 Sm. & M. 122 (1849).

² Beach v. State Bank, 2 Ind. 488 (1851).

³ Catskill Bank v. Stall, 15 Wend. 364 (1836); affirmed as Stall v. Catskill Bank, 18 Ib. 466 (1837); Wells v. Evans, 20 Ib. 251 (1838); Austin v. Vandermark, 4 Hill 259 (1843); Chemung Canal Bank v. Bradner, 44 N. Y. 680 (1871); Beach v. State Bank, 2 Ind. 488 (1851); Waldo Bank v. Lumbert, 16 Me. 416 (1839).

⁴ Roth v. Colvin, 32 Vt. 125 (1859).

⁵ Stockdale v. Keyes, 79 Penna. St. 251 (1875).

⁶ Bank of St. Albans v. Gilliland, 23 Wend. 311 (1840).

⁷ Bank of Vergennes v. Cameron, 7 Barb. 143 (1849).

⁸ Tanner v. Hall, 1 Penna. St. 417 (1845).

But the fact that a note payable to one firm was indorsed to another firm by a partner common to both, and indorsed by such partner for the latter firm also, and discounted by him, will not amount to notice of its accommodation character.¹

§ 423. **Violation of Partnership Agreement.**—The articles of partnership frequently limit the power of individual partners to bind the firm by bills, notes or indorsements, and in such case their power is to be determined by such articles, except where purchasers without notice before maturity may be concerned.² Against a *bona fide* purchaser for value before maturity it is no defense to show that such paper was executed in violation of the articles of partnership.³ But such restrictions are a good defense at suit of a holder with notice; and so is any notice that the firm will not be responsible for the paper.⁴ Where a partnership acceptance given in violation of such agreement is in the hands of a holder who has notice of the agreement, its further negotiation will be restrained by injunction.⁵

If the violation of the articles of partnership is once proved, it then devolves on the holder to prove that he is a holder in good faith and for value.⁶ But where an acceptance has been given in fraud of the partnership, and issue is taken by the firm *on the acceptance*, the burden of proof is on the firm to show that the holder had notice of the fact;

¹Atlas National Bank v. Savery, 127 Mass. 75 (1879).

²Kimbro v. Bullitt, 22 How. 256 (1859).

³Byles 48; Chitty 52, 55; 1 Daniel 340; 1 Edwards § 97; 1 Parsons 133; Hogg v. Skene, 34 L. J. C. P. 153; Sandilands v. Marsh, 3 B. & Ald. 678; Barrett v. Russell, 45 Vt. 43 (1872); National Union Bank v. Landon, 66 Barb. 189 (1870), affirmed by Ct. Appeals, 40 How. Pr. 721; Winship v. Bank of the U. S., 5 Pet. 529 (1831); Michigan Bank v. Eldred, 9 Wall. 544 (1869); First Nat. Bank v. Morgan, 6 Hun 346 (1876); Pursley v. Ramsey, 31 Ga. 403 (1860); Gregg v. Fisher, 3 Bradw. 261 (1878); Cottans v. Smith, 27 La. An. 128 (1875).

⁴Byles 49; Chitty 62; Galway v. Matthew, 10 East 264; S. C., 1 Campb. 403; Mimit v. Whitney, 16 Vin. Abr. Partners, A., 244; Willis v. Dyson, 1 Stark. 164; Vere v. Fleming, 1 Younge & J. 227; Monroe v. Conner, 15 Me. 179 (1838); Dickson v. Penrose, 2 Miles 366 (1839). So, too, although the partnership was for a specified period, Booth v. Quin, 7 Price 193.

⁵Hood v. Aston, 1 Russ 412.

⁶Byles 49; Chitty 55; 1 Daniel 341; 1 Edwards § 97; Grant v. Hawkes, K. B. Guildhall 1817; Hogg v. Skene, 34 L. J. C. P. 153; Puller v. Roe, Peake 197.

and until that is shown he is not required to prove himself a holder for value.¹ That a firm acceptance has been given without authority, and that the holder had notice of the want of authority, may be shown in evidence under the general issue.²

§ 424. **Fraud—As a Defense.**—We have hitherto spoken only of such particular fraud as is involved in the giving of partnership paper for an individual debt or for the accommodation of a third party or in violation of a partnership agreement. But, in general, all fraud between a partner and the holder of such paper will avoid it both against the firm and against other parties.³ And where both parties to a transfer are partakers in the fraud, the transferee will hold such paper as a mere trustee for the firm and its creditors.⁴

But fraud against the firm will not render the paper invalid in the hands of a *bona fide* holder for value.⁵ So, where one partner receives and misappropriates money in the regular business of the firm, and gives a receipt for it in the firm name, the firm will be liable for such misappropriation to the person defrauded.⁶ So, if a note is given to one partner in payment for partnership property sold, and is disposed of by him in fraud of his partners, this defense will not be available at suit of a *bona fide* holder for value.⁷ And subsequent misapplication of money obtained by dis-

¹ Byles 49; *Musgrave v. Drake*, 5 Q. B. 185. But see dissent of Wills, J., in *Hogg v. Skene*, 34 L. J. C. P. 153.

² Byles 49; *Jones v. Corbett*, 2 Q. B. 828; *Grout v. Enthoven*, 1 Exch. 382.

³ Byles 48; *Ex parte Bonbonus*, 8 Ves. 540; *Wells v. Masterman*, 2 Esp. 731; *Green v. Deakin*, 3 Stark. 347. See, too, *Cotton v. Van Bokkelin*, 1 Dev. & B. Eq. 284 (1835).

⁴ *Stegall v. Coney*, 49 Miss. 761 (1874).

⁵ Byles 48; *Chitty* 60; 1 *Parsons* 125; *Ridley v. Taylor*, 13 East 175; *Sutton v. Gregory*, *Peake Add. Cas.* 150; *Duncan v. Clark*, 2 Rich. 587 (1846); *Hopkins v. Boyd*, 11 Md. 107 (1857); *Parker v. Burgess*, 5 R. I. 277 (1858); *Windham Co. Bank v. Kendall*, 7 *Ib* 77 (1861); *Cotton v. Van Bokkelin*, *supra*; *Boardman v. Gore*, 15 Mass. 339 (1819); *Manufacturers, &c., Bank v. Gore*, 15 Mass. 75 (1818); *First Nat. Bank v. Morgan*, 73 N. Y. 593 (1878). So, where notes belonging to the firm are fraudulently transferred by one partner and come to the hands of a *bona fide* holder for value, *Hibernian Bank v. Everman*, 52 Miss. 500 (1876).

⁶ *Atkinson v. Mackreth*, L. R. 2 Eq. 570 (1866). See, too, *St. Aubyn v. Smart*, *Ib*. 183 (1867); *S. C.*, L. R. 3 Ch. 646 (1868).

⁷ *Nichols v. Sober*, 38 Mich. 678 (1878).

counting the firm paper in the regular course of its business will not relieve the firm from its liability to holders of such paper.¹ So, too, a surviving partner will be liable on a partnership bill executed in blank by his deceased partner and fraudulently negotiated after his death to a *bona fide* holder by a clerk of the firm, who filled the blank with a date prior to the death of the partner.² And in case of fraud by a deceased partner, although his executor could not be sued at law, he may be held liable in equity to a *bona fide* holder for the amount of the note or bill fraudulently given.³ But the agent for selling a patent, who is authorized by the owner to take notes payable to both in their joint names, cannot as a partner bind his principal, the owner of the patent, by a fraudulent accommodation indorsement, even in the hands of a *bona fide* holder for value before maturity.⁴

§ 425. **Pleading Fraud—Burden of Proof.**—Fraud upon the partnership in giving a bill or acceptance may be proved under the general issue.⁵ But under such plea the defendant must prove notice as well as fraud.⁶ And where fraud is alleged, an injunction will be granted to restrain the negotiation of the bill by a holder for value, who had notice that the acceptance had been improperly given in the firm name.⁷

Until, however, fraud is shown, the authority of the partner to make the paper in dispute is presumed.⁸ If it is shown to have been made in a business outside of that of the firm, fraud will be presumed against a holder with notice.⁹ But the purchaser has no grounds for suspicion in the fact that the note in question was made in one firm name and indorsed in another, by one who is the common partner of

¹ *Winship v. Bank of United States*, 5 Pet. 529 (1831).

² *Usher v. Dauncey*, 4 Campb. 97.

³ *Lane v. Williams*, 2 Vern. 277; *Devaynes v. Noble*, 1 Meriv. 563; *Ander son v. Maltby*, Bro. C. C. 423; 2 Ves. Jr. 244.

⁴ *Hotchkiss v. English*, 4 Hun 369 (1875); S. C., 6 T. & C. 658.

⁵ *Jones v. Corbett*, 2 Q. B. 828; *Grout v. Enthoven*, 1 Exch. 382.

⁶ *Musgrave v. Drake*, 5 Q. B. 185 (1843).

⁷ *Hood v. Aston*, 1 Russ. 412.

⁸ *Carrier v. Cameron*, 31 Mich. 373 (1875).

⁹ *Eastman v. Cooper*, 15 Pick. 276.

both firms, and such purchaser will not be required to prove the assent of either firm.¹ And this is true, although both signatures are in the same handwriting and the note is payable to the partner who obtained the discount and wrote the signatures.² Suspicious circumstances are, in such case, only material as evidence of bad faith on the holder's part.³ And the rule is the same as to gross negligence.⁴

But where a bill of exchange has been accepted by one partner in fraud of his firm, with a blank for the drawer's name, and the bill is delivered in this shape for value by a holder with notice to his partner in another firm without notice, and filled in by the latter with his own firm name as drawers, such last holder cannot recover against the firm purporting to have accepted the bill.⁵ On the other hand, a bill of exchange executed in blank by one partner in the firm name and for partnership purposes, and left negligently within the control of a clerk, who dates it back and negotiates it in fraud of the firm after the death of the partner drawing it, will bind the surviving partners.⁶

Where fraud is shown on the part of the firm seeking exoneration, the burden is upon the holder to prove his own good faith.⁷ In such case he must also prove himself to be a holder for value, and this is especially true if he has taken the paper under suspicious circumstances.⁸

§ 426. Dissolution of Firm—Surviving Partners.—After

¹ *Ihmsen v. Negley*, 25 Penna. St. 297 (1855). And the firms defrauded by such act will have no right to demand contribution from one another by reason of the fraud of their common partner, *Grubb v. Cottrell*, 62 *Ib.* 23 (1869).

² *Miller v. Consolidation Bank*, 48 Penna. St. 514 (1865).

³ *Chitty* 60; *Goodman v. Harvey*, 4 Ad. & El. 870; S. C., 6 Nev. & M. 272. In the earlier view of this question, see *Down v. Hallington*, 4 B. & C. 330.

⁴ *Chitty* 60; *Crook v. Jadis*, 5 B. & Ad. 909; S. C., 3 Nev. & M. 257; *Backhouse v. Harrison*, 5 B. & Ad. 1098; S. C., 3 Nev. & M. 188.

⁵ *Hogarth v. Latham*, L. R. 3 Q. B. D. 643 (1878).

⁶ *Usher v. Dauncey*, 4 Campb. 97.

⁷ *Byles* 48; 1 *Parsons* 128; *Hogg v. Skene*, 34 L. J. C. P. 153; *Bank of Vergennes v. Cameron*, 7 Barb. 143 (1849); *Carrier v. Cameron*, 31 Mich. 373 (1875); *Munroe v. Cooper*, 5 Pick. 412 (1827).

⁸ *Heath v. Sansom*, 2 B. & Ad. 291. In this case the maker of the note gave it for an individual debt to another firm of which he was also a member.

the dissolution of a partnership the partners have no longer power to bind one another by their contract. On the other hand, dissolution of the firm will not affect a partnership liability already incurred.¹ So, if the dissolution of a firm be unknown to the holder of its paper, his subsequently taking a renewal of the paper from one partner in the firm name will not discharge the original partners.² Nor will the holder of a partnership note be affected by the subsequent dissolution of the firm with an agreement between the partners that its debts should be paid by one of them.³

In general, an action for a partnership debt lies against the surviving partners only, upon dissolution of the firm by the death of any partner. Yet if the surviving partner is a certificated bankrupt, it has been held that an action may be maintained against the executor of the deceased partner.⁴ And, on the other hand, a surviving partner is entitled to the partnership assets and may recover possession of a note in trover from the representatives of a deceased partner, notwithstanding an agreement between the maker of the note and the deceased partner for a set-off of such partner's individual debt against the note, the agreement not having been carried out in the deceased partner's life-time.⁵ If several partners give their joint and several note, although at law the administrator of a deceased partner will be liable upon it, yet his separate estate will be protected in equity by application in the first instance of the partnership assets to the payment of such note.⁶

§ 427. **After Dissolution—No Power to Draw Bills.**—After the dissolution of a firm has been made publicly known, the partners have no longer power to bind one another by bill or

¹ *Gulick v. Gulick*, 1 Harr. 186 (N. J. 1837).

² *Miller v. Miller*, 8 W. Va. 542 (1875).

³ *Mogelin v. Westhoff*, 33 Tex. 788 (1870).

⁴ *Lang v. Keppele*, 1 Binn. 123 (1804); *Caldwell v. Stileman*, 1 Rawle 212 (1829).

⁵ *Stearns v. Houghton*, 38 Vt. 583 (1865). And such surviving partner will not be restrained from using the name of the deceased partner in the old business, *Webster v. Webster*, 3 Swanst. 490.

⁶ *Filley v. Phelps*, 18 Conn. 301 (1847).

note.¹ Such a note would, however, bind the individual partner executing it.² Where a firm has been dissolved and its debts have been assumed by another firm having in it one of the partners of the original firm, he has no power to give a note in the name of the original firm for its debt.³ So, if goods have been ordered by a firm and have been delivered after its dissolution to one of the former partners doing business in his own name, and a bill of exchange has been drawn on the firm after such dissolution and accepted by the partner receiving and using the goods, such acceptance will not bind the other partners.⁴ And it makes no difference, as a general rule, that the partnership note given after its dissolution was in settlement of its debts. If the holder knew of the dissolution, the note will not bind the partners who did not assent to it.⁵ And if one partner on the dissolution of the firm agrees to pay its debts, and afterwards draws a bill of

¹ Byles 51; Chitty 65; 1 Daniel 345; 1 Edwards § 113; 1 Parsons 144; Heath v. Sansom, 4 B. & Ad. 172; S. C., 1 Nev. & M. 104; Woodworth v. Downer, 13 Vt. 522 (1841); Haddock v. Crocheron, 32 Tex. 276 (1869); Kendall v. Riley, 45 Ib. 20 (1876); Mitchell v. Ostrom, 2 Hill 520 (1842); Meyer v. Atkins, 29 La. An. 586 (1877); Merrit v. Pollys, 16 B. Mon. 355 (1855); Fowler v. Richardson, 3 Sneed 508 (1856); Hurst v. Hill, 8 Md. 399 (1855); Ransom v. Loyless, 49 Ga. 471 (1873); Morrison v. Perry, 11 Hun 33 (1877); Montague v. Reakert, 6 Bush 393 (1869); Curry v. White, 51 Cal. 530 (1876); Bryant v. Lord, 19 Minn. 396 (1872); Lusk v. Smith, 8 Barb. 570 (1850); Bank of Montreal v. Page, 98 Ill. 109 (1881); Tombeckbee Bank v. Dumell, 5 Mason 56 (1828). But where an acceptance was given on the 23d day of April, 1861, by one member of a firm divided and dissolved by the war, the period of dissolution was fixed by the president's proclamation on the 16th day of August, 1861, and the acceptance was held to be binding on the firm, Matthews v. McStee, 1 Otto 7 (1875). Where a note is given after dissolution in the firm name, the partnership may be discharged and the individual signer held, Ransom v. Loyless, 49 Ga. 471 (1873). If, on the other hand, such note be given in renewal and on surrender of a former partnership note, the original liability of the firm will not be discharged, Turnbow v. Broack, 12 Bush 455 (1876). As to this, see, also, chapter on Payment by Note, *infra*. But the relation of the partner assuming to pay the debts of the dissolved firm as to the other partners has been held to be that of principal to surety, and an extension given to him on a note in the firm name made by him after dissolution has been held to discharge the others, Smith v. Sheldon, 35 Mich. 42 (1876).

² Robb v. Mudge, 14 Gray 534 (1860).

³ Brown v. Broad, 52 Miss. 536 (1876).

⁴ *Ex parte* Harris, 1 Madd. 583.

⁵ Martin v. Walton, 1 McCord 16 (1821); Bank of South Carolina v. Humphreys, 1 McCord 388 (1821); Perrin v. Keene, 19 Me. 355 (1841); Hamilton v. Seaman, 1 Ind. 185 (1848). Nor for goods ordered by the firm before its dissolution, Goodspeed v. South Bend, &c., Plow Co., 45 Mich. 237 (1881).

exchange in the firm name for that purpose, it will not bind the other partners.¹

§ 428. **Implied Powers after Dissolution—Admissions.**—Power to bind the firm, however, by a bill or note may be given by implication after the dissolution of the firm.² And, in Pennsylvania at least, a partnership still exists after its dissolution, for the purpose of closing its business, and one partner may bind the firm by a note given for that purpose;³ especially, where he remains in possession of the place of business of the firm and attends to the collection of its debts. And in such case he may bind the firm by a note given in settlement of its debt without any express authority from the others.⁴ But one partner cannot bind the others after dissolution of the firm by a note in the firm name given under a previous power of attorney, where the dissolution is known to the payee.⁵ Nor can one partner after dissolution bind the others by a fresh promise to pay a note, on which their liability as indorsers had been discharged by want of proper notice of protest.⁶

But it has been held that, even after dissolution of the firm, all the partners will be bound by an admission made by one in relation to a previous transaction of the firm.⁷ And such admission may be used in evidence against all in an action of assumpsit for moneys loaned to the firm and bills accepted by the plaintiff on its behalf.⁸ So, an ac-

¹ *Le Roy v. Johnson*, 2 Pet. 186 (1829); *Brown v. Chancellor*, 61 Tex. 437 (1884). So, of a bill drawn to borrow money to pay such debts, *Hayden v. Cretcher*, 75 Ind. 108 (1881). But see, *contra*, *Siegfried v. Ludwig*, 102 Penna. St. 547 (1883).

² *Graves v. Merry*, 6 Cow. 701 (1827).

³ *Ward v. Tyler*, 52 Penna. St. 393 (1866). See, too, remarks of Savage, C. J., in *McPherson v. Rathbone*, 11 Wend. 96 (1831).

⁴ *Robinson v. Taylor*, 4 Penna. St. 242 (1846). See, too, *McCowin v. Cubbison*, 72 *Ib.* 358 (1872); *Estate of Davis*, 5 Whart. 530 (1840). In this last case the money, for which the note was given, was loaned on the credit of the firm by one who knew of its dissolution, and was applied for its benefit.

⁵ *Schlater v. Winpenny*, 75 Penna. St. 321 (1874).

⁶ *Schoneman v. Fegley*, 7 Penna. St. 433 (1848). Or by the Statute of Limitations, *Casebolt v. Ackerman*, 17 Vroom 169 (1884).

⁷ *Wood v. Braddock*, 1 Taunt. 104; *Halliday v. Ward*, 3 Campb. 32.

⁸ *Parker v. Merrill*, 6 Me. 41 (1829); *Cady v. Shepherd*, 11 Pick. 400 (1831).

knowledge, made by one partner after dissolution of the firm, as to the amount of a balance due to the firm, is admissible to charge all the partners.¹ But where a partnership note has been given by one of the partners after its dissolution, his admissions as to the transactions of the firm for which the note was given have been held not to be binding upon the others.² And the admission of one partner, made after dissolution of the firm, to the effect that a draft indorsed by him in the firm name has been duly protested, will not amount to proof of notice against the others.³

§ 429. **Ratification after Dissolution—Consent.**—It is said that one partner after dissolution may bind the other by receiving a note in payment of a debt due it and discharging the debtor.⁴ And if a partnership note is given after dissolution by consent of all the partners for a partnership debt, it will be binding on them all.⁵ And they will be bound in like manner by their subsequent ratification of such a note given without their authority.⁶ And in the case of such a note given without authority, a partner's subsequent acknowledgment of his liability and promise to pay the note will be binding on him; especially where, on the dissolution of the firm, he had assumed such debt and agreed to pay it.⁷ And such note may be afterwards ratified by the other partners by their making a payment on account of it and become binding on them.⁸ So, an indorsement by one partner in the name of his firm after dissolution will be ratified by, and binding upon, another partner who knowingly receives his share of the proceeds of discounting such note.⁹

¹ *Ide v. Ingraham*, 5 Gray 106 (1855). But see, *contra*, *Kendall v. Riley*, 45 Tex. 20 (1876).

² *Maxey v. Strong*, 53 Miss. 380 (1876).

³ *Bank of Vergennes v. Cameron*, 7 Barb. 143 (1849).

⁴ *Riddle v. Etting*, 32 Penna. St. 412 (1859). In this case the ex-partner's action was specially authorized by the articles of dissolution, *Ib.*

⁵ *Randolph v. Peck*, 1 Hun 125 (1874). And see *McPherson v. Rathbone*, 11 Wend. 96 (1831).

⁶ *Draper v. Bissel*, 3 McLean 275 (1843).

⁷ *Peets v. Riley*, 26 La. An. 712 (1874).

⁸ *Eaton v. Taylor*, 10 Mass. 54 (1813); *Chase v. Kendall*, 6 Ind. 304 (1855).

⁹ *First Nat. Bank of Mankato v. Parsons*, 19 Minn. 289 (1872).

§ 430. **Powers of Liquidating Partner.**—Mere authority to settle the affairs of a firm will not, in general, include the power to bind it by commercial paper given in its name.¹ Nor will an authority "to settle all demands in favor of, or against, said firm" confer such power.² Nor even, it has been held, authority to settle the business of the firm and "to sign the name of the firm for that purpose."³ In like manner, the partner engaged in winding up the concerns of a firm derives no authority from that fact to bind it by renewals of its notes in the firm name.⁴ So, a partner who is authorized after dissolution of the firm to receive and pay its debts, has no power to bind it by an indorsement, although given for the purpose of paying a firm debt.⁵ On the other hand, the general power of all the partners to receive payment of debts due to the firm before its dissolution will authorize one of the partners to take an acceptance from a debtor of the firm; and the fact that the partners have agreed among themselves that another partner should collect the debts will constitute no defense to such acceptance.⁶ The power given in Pennsylvania to the partner charged with settling up the business of a firm after its dissolution does not extend to the others. Such partner is therefore the only one who can bind the firm after its dissolution by a firm note given for money borrowed to pay its debts.⁷

The power of a partner to bind his firm after its dissolution by a renewal note may be implied from his authority to settle the firm business and to use its name in such settlement.⁸

¹ *Myatts v. Bell*, 41 Ala. 222 (1867); *Brown v. Chancellor*, 61 Tex. 437 (1884); or to renew a matured bill, *Ib.*; *Martin v. Walton*, 1 McCord 16 (1821).

² *Lockwood v. Comstock*, 4 McLean 383 (1848).

³ *National Bank v. Norton*, 1 Hill 572 (1841).

⁴ *White v. Tudor*, 24 Tex. 639 (1860).

⁵ *Chitty* 69; *Kilgour v. Finlyson*, 1 H. Bl. 155; *Abel v. Sutton*, 3 Esp. 108; *Smith v. Winter*, 4 M. & W. 454; *Anderson v. Weston*, 6 Bing. N. C. 296. But see, as to an indorsement given in carrying out a specific prior agreement, *Star Wagon Co. v. Swezey*, 52 Iowa 391 (1879); S. C., 59 *Ib.* 609 (1882).

⁶ *King v. Smith*, 4 C. & P. 108.

⁷ *McCowin v. Cubbison*, 72 Penna. St. 358 (1872); *Fulton v. Central Bank*, 92 *Ib.* 112 (1879).

⁸ *Myers v. Huggins*, 1 Strobb. 473 (1847).

And, in such case, the other partners may be bound by an admission on their part that they had left the assets of the firm in the hands of such acting partner for the purpose of winding up its affairs, and that they "had no objection to his using the partnership name" for that purpose; and the jury may infer from such admission a power to indorse and transfer a note belonging to the firm left in the hands of such partner.¹ And where a firm on its dissolution authorizes a partner to use the firm name for the purpose of liquidating its debts, the other partners will be bound by a note indorsed by him without their knowledge in the firm name and discounted and used for that purpose.² It has been held, however, in many cases that the power given to a partner on dissolution of the firm to use its name in settlement of its affairs will not extend to an indorsement in its name of a new note in renewal of a former indorsement of the firm.³

§ 431. **Ante-dating Dissolution — Blank Instruments.** — Where the firm is dissolved, and a note or bill is afterwards given in its name without authority, and dated back so as to ante-date the dissolution of the firm, it will not be binding upon the firm even in the hands of a *bona fide* holder for value.⁴ So, if a bill or check is drawn before the dissolution of a firm and not delivered until afterwards, it will not be binding upon the firm.⁵ Where a note has been indorsed in the partnership name by one partner in blank, and transferred by him after the dissolution of the firm, it will be presumed to have been properly indorsed and transferred to such partner at the time of its date.⁶ So, where one partner drew and indorsed a blank bill of exchange in the name of

¹ Smith v. Winter, 4 M. & W. 454.

² Lloyd v. Thomas, 79 Penna. St. 68 (1875).

³ Martin v. Kirk, 2 Humph. 529 (1841); Parker v. Cousins, 2 Gratt. 372 (1845); Long v. Story, 10 Mo. 636 (1847); Palmer v. Dodge, 4 Ohio St. 21 (1854).

⁴ Wrightson v. Pullan, 1 Stark. 375 (1816); Lansing v. Gaine, 2 Johns. 300 (1807).

⁵ Woodford v. Dorwin, 3 Vt. 82 (1830); Gale v. Miller, 54 N. Y. 536 (1874), affirming 1 Lans. 451 (1868), 44 Barb. 420 (1865).

⁶ Fletcher v. Anderson, 11 Iowa 228 (1860).

his firm, and the blanks were, after the death of such partner, filled up and the bills negotiated, the other partners were held liable upon it.¹

§ 432. **Renewals after Dissolution.**—Power to bind a firm by renewal of its paper, like the original power to make such paper, expires on the dissolution of the firm.² And this is so, although the firm, before its dissolution, had arranged with the officers of the bank holding the paper for leave to renew it until a certain time, and the renewal in dispute was given within such time, but after the dissolution of the firm.³ But to discharge the firm's liability for a debt secured by its note, which had been renewed by one partner after dissolution of the firm, the holder must have had notice of such dissolution before taking the renewal and relinquishing the original note given for the debt.⁴ Where one firm owes money to another and upon its dissolution one partner assumes the debt, and on the dissolution of the other firm a balance is found due from it to one of its partners, a note afterwards made by the partner assuming the debt of the first firm in the name of his firm to the individual partner of the other firm, in whose favor the balance stood, for such debt is not in the usual course of business and will not be binding on the other members of either firm.⁵

§ 433. **Transfer of Assets after Dissolution.**—After dissolution of a firm, one partner can no longer transfer bills and notes belonging to the firm so as to bind the others by his indorsement;⁶ even though he be the liquidating partner,⁷

¹ *Usher v. Dawncey*, 4 Campb. 97.

² *Vernon v. Manhattan Co.*, 17 Wend. 524 (1837), affirmed 22 *Id.* 183; *National Bank v. Norton*, 1 Hill 572 (1841); *Palmer v. Dodge*, 4 Ohio St. 21 (1854), approved in *Wilson v. Forder*, 20 *Id.* 9 (1870); *Moore v. Lackman*, 52 Mo. 323 (1873); *Lumberman's Bank v. Pratt*, 51 Me. 563 (1863).

³ *Bank of South Carolina v. Humphreys*, 1 McCord 388 (1821).

⁴ *Brown v. Clark*, 14 Penna. St. 469 (1850).

⁵ *Hicks v. Russell*, 72 Ill. 230 (1874).

⁶ *Byles* 53; *Chitty* 66; 1 *Daniel* 345; 1 *Edwards* § 126; 1 *Parsons* 146; *Dolman v. Orchard*, 2 C. & P. 104; *Anderson v. Weston*, 6 Bing. N. C. 296; *Abel v. Sutton*, 3 Esp. 108; *Kilgour v. Finlyson*, 1 H. Bl. 155; *Sandford v. Mickles*, 4 Johns. 224 (1809). See, however, *Lewis v. Reilly*, 1 Q. B. 349 (1841).

⁷ *Whitworth v. Ballard*, 56 Ind. 279 (1877).

and though the transfer be made in payment of a debt due by the firm before its dissolution.¹

After dissolution of a firm by bankruptcy, the partners will not be rendered liable by an indorsement by one of their number.² So, after dissolution by the outbreak of war, rendering the former partners alien enemies.³ But it has been held that an indorsement by one in the firm name after its dissolution, will, at least, bind him individually.⁴ And in England it is held that such indorsement will be valid as a transfer of the paper, although not binding upon the partners as an indorsement.⁵ And the same rule has been adopted in this country in favor of holders without notice,⁶ and in support of indorsements "without recourse" made under an express authority to sell such paper.⁷ Power to indorse partnership securities after dissolution may be implied, like the power to make such instrument.⁸ And where the firm was bound by agreement to indorse certain notes received by it as agent, it was held that the liquidating partner could render the others liable by an indorsement and guaranty in the firm name.⁹

§ 434. **Dissolution by Death—Power of Surviving Partner.**—Thus, where an action is brought upon a firm note against the estate of a deceased partner, it is a good defense that the note was executed by the other partner after the dissolution

¹ *Humphries v. Chastain*, 5 Ga. 166 (1848).

² *Bytes 54; Thomason v. Frere*, 10 East 418.

³ *Bank of New Orleans v. Matthews*, 49 N. Y. 12 (1872).

⁴ *White v. Union Ins. Co.*, 1 Nott. & McC. 561 (1819). Although the indorsement was signed "B. & H., old firm in liquidation," *Fassin v. Hubbard*, 55 N. Y. 465 (1874).

⁵ *King v. Smith*, 4 C. & P. 108; *Lewis v. Reilly*, 1 Q. B. 349. But such an indorsement after maturity of the note was held to pass no legal title in *Parker v. Macomber*, 18 Pick. 505 (1836). And the same has been held as to notes not yet due in the hands of a liquidating partner, *Geortner v. Trustees of Canajoharie*, 2 Barb. 625 (1847); especially where the transfer was made for the partner's individual debt, *Fellows v. Wyman*, 33 N. H. 351 (1856). Unless the instrument is payable to such partner individually, *Temple v. Seaver*, 11 Cush. 314 (1853).

⁶ *Cony v. Wheelock*, 33 Me. 366 (1851); *Pitcher v. Barrows*, 17 Pick. 361 (1835).

⁷ *Yale v. Eames*, 1 Metc. 486 (1840); *Waite v. Foster*, 33 Me. 424 (1851).

⁸ *Bytes 53; Smith v. Winter*, 4 M. & W. 454.

⁹ *Star Wagon Co. v. Swezey*, 52 Iowa 391 (1879).

of the firm.¹ Where a partnership has been dissolved by death, the surviving partner may indorse and transfer notes belonging and payable to the firm.² But in Missouri, though he may transfer such notes in payment of the firm debts, yet if he fail to give the security required of administrators by law, the personal representative of the deceased partner may, upon giving the required bond, recover the possession and control of such note from the surviving partner.³

Where a firm has been dissolved by the death of one partner, one of two surviving partners has no power to make an assignment of partnership assets for the benefit of creditors without consent of the other.⁴ And where a firm has been dissolved by the death of one member, one survivor cannot bind the others by indorsing a note, even for a debt of the firm, without the consent or ratification of the others.⁵ But if a surviving partner makes a transfer of firm assets in the name of the firm, it will dispose of his own entire interest in the property.⁶

The surviving partner cannot by delivery transfer the legal title of his firm in a note made payable to the partnership and indorsed by the deceased partner.⁷ And where a surviving partner, in payment of a firm debt, makes a note payable to the firm and indorses it in the firm name to the creditor, it is the same as though it were made payable to a fictitious person (the firm having then no existence), and the partner making the same will be liable as maker in an action brought on it against him by the payee.⁸

¹ *Floyd v. Miller*, 61 Ind. 224 (1878); *Bank of Port Gibson v. Baugh*, 9 Smedes & M. 290 (1848).

² *Johnson v. Berlzheimer*, 84 Ill. 54 (1876); *Bredow v. Mutual Sav. Inst.* 28 Mo. 181 (1859).

³ *Bredow v. Mut. Savings Inst.*, *supra*.

⁴ *Egberts v. Wood*, 3 Paige 517 (1832).

⁵ *Carleton v. Jenness*, 42 Mich. 110 (1879). Neither can a surviving partner renew an accommodation partnership indorsement, so as to bind the estate of a deceased partner, which has been discharged by the holder's failure to protest the original note, on its maturing after such partner's death, *Central Savings Bank v. Mead*, 52 Mo. 546 (1873).

⁶ *Jones v. Thorn*, 2 Mart. (N. S.) 463 (1824).

⁷ *Glasscock v. Smith*, 25 Ala. 474 (1854).

⁸ *Cavitt v. James*, 39 Tex. 189 (1873).

But where one partner on the dissolution of the firm has been authorized to settle its debts and other affairs, he may transfer a note belonging to it and payable to bearer by his indorsement without recourse.¹ And he may assign to a firm creditor a debt due to the firm in payment of such creditor's claim.² But it is not a debt of the firm where goods have been ordered by a firm but are delivered after its dissolution to one of the partners, and if they are paid for by an acceptance by him of a bill of exchange drawn on both, the other partner will not be liable on such acceptance.³

§ 435. **Dissolution—When Admissible as a Defense.**—Where a bill or note is signed by one partner after the dissolution of the firm, it will be binding upon all in the hands of a *bona fide* holder for value without notice of the dissolution.⁴ And this is true, also, of indorsements and acceptances.⁵ But in such case the indorsee must prove that he took the paper for value and before maturity and without notice.⁶

Where a note is given in the firm name by one member after its dissolution, for money loaned by an old customer on the faith and credit of the firm and actually applied by the partner obtaining it to the business of the firm, the lender, having no notice of the dissolution, may recover on it.⁷ And even where the payee of such a note knew at the time that the firm had been dissolved, it would still be binding upon all the partners in the hands of a *bona fide* indorsee for value before maturity.⁸ Although this was formerly held in New

¹ Parker v. Macomber, 18 Pick. 505 (1836).

² Milliken v. Loring, 37 Me. 408 (1854).

³ *Ex parte* Harris, 1 Madd. 583.

⁴ Buffalo City Bank v. Howard, 35 N. Y. 500 (1866); Van Eps v. Dillaye, 6 Barb. 244 (1849); Holtgreve v. Wintker, 85 Ill. 470 (1877); Merrit v. Pollys, 16 B. Mon. 355 (1855); Stall v. Cassady, 57 Ind. 284 (1877); Davis v. Willis, 47 Tex. 154 (1877); Goddard v. Pratt, 16 Pick. 412 (1835); Mauldin v. Branch Bank, 2 Ala. 502 (1841); Long v. Garnett, 59 Tex. 229 (1883). And this is true notwithstanding a subsequent invalid renewal of the note after notice of dissolution, Hammond v. Aiken, 3 Rich. Eq. 119 (1850).

⁵ Lacy v. Woolcot, 2 Dowl. & R. 458; Wagner v. Freschl, 56 N. H. 495 (1876).

⁶ Clark v. Dearborn, 6 Duer 309 (1857).

⁷ Hunt v. Hall, 8 Ind. 215 (1856).

⁸ Albietz v. Mellon, 37 Penna. St. 367 (1860).

York not to be the rule where the indorsee took such paper merely as collateral for a precedent debt.¹ But a note made after dissolution of the firm will not be binding upon it in the hands of the payee, although he had no knowledge of the dissolution of the firm, and took the paper in payment of an existing debt due from the firm.² And such payees are not entitled to come in for a share of the assets of the firm with the firm creditors.³ On the other hand, where a firm has been dissolved by a secret act of bankruptcy, the solvent partner may, by accepting a bill of exchange for a previous partnership debt, render the firm liable, and such acceptance in the hands of an innocent holder may be proved against the joint estate of both partners on the subsequent bankruptcy of the solvent partner.⁴

It is no defense that a bill of exchange has been made after the dissolution of the firm, if it is in the hands of a holder with notice deriving his title from a holder for value and without notice before maturity.⁵ And it has been held in Pennsylvania that the plaintiff is not obliged to prove himself a *bona fide* holder for value before maturity, unless the defense of dissolution of the firm has been specially pleaded.⁶

§ 436. **Notice of Dissolution.**—Where a firm is dissolved, it is the duty of the partners to give notice of that fact to all old customers of the firm, in order to avoid liability for contracts afterwards made by one another in the firm name.⁷

¹Bristol v. Sprague, 8 Wend. 423 (1832), where the indorser had agreed to pay part of the debt if the note should not be collected. But it would be otherwise, if received in payment and discharge of the former debt, Bank of St. Albans v. Gilliland, 23 Wend. 311 (1840).

²Morrison v. Perry, 11 Hun 33 (1877).

³Haggerty v. Taylor, 10 Paige 261 (1843).

⁴*Ex parte* Robinson, 1 Mont. & Ayr. 18; S. C., 3 Dea. & Chitty 376; *Ex parte* Ellis, Mont. & B. 249; S. C., 2 Dea. & Chitty 555.

⁵Byles 52; Booth v. Quin, 7 Price 193; Boyd v. McCann, 10 Md. (1856).

⁶Albietz v. Mellon, 37 Penna. St. 367 (1860).

⁷Chitty 64; 1 Daniel 324; 1 Edwards § 117; 1 Parsons 142; Parkin v. Carruthers, 3 Esp. 248; Bank of Commonwealth v. Mudgett, 44 N. Y. 514 (1871), affirming 45 Barb. 663; Wardwell v. Haight, 2 Barb. 549 (1848); Simonds v. Strong, 24 Vt. 642 (1852); Dickinson v. Dickinson, 25 Gratt. 321 (1874); National Shoe, &c., Bank v. Herz, 89 N. Y. 629 (1882); Buffalo City Bank v. Howard, 35 N. Y. 500 (1866); Dundass v. Gallagher, 4 Penna. St. 205 (1846).

In general, such customers include only those who have dealt directly with the firm, and not one who has merely dealt in paper drawn or indorsed by the firm.¹ But any creditor of the firm, who has taken its note in payment, is a customer entitled to more particular notice than the mere public advertisement of dissolution.² And where a firm has accepted a bill of exchange before its maturity, but after dissolution of the firm and after transfer of the bill by indorsement, a holder who had taken previous acceptances of the firm is entitled to notice of dissolution, and in the absence of such notice can hold the firm.³ Two previous transactions have been held to be sufficient to constitute one an old customer and entitle him to such notice.⁴ In the absence of such notice, he can hold all the original partners, especially where the business is carried on after dissolution and the new debt contracted without any change of the firm name.⁵

In general, where a firm is dissolved by the death of a partner, notice of the fact is unnecessary.⁶ So, if it is dissolved by operation of law, or by any event of public notoriety, such as an act of bankruptcy or the outbreak of a war.⁷ In like manner, notice of dissolution is not, in general, necessary to relieve a secret partner from liability.⁸ If, however, such secret or dormant partner was known to the customer as a member of the firm, notice to him would be

¹ *City Bank v. McChesney*, 20 N. Y. 240 (1859); *Hutchins v. Bank of Tennessee*, 8 Humph. 418 (1847). But a bank which was in the habit of discounting for the firm notes and bills indorsed by them is entitled to notice as an old customer or dealer, *Id.*; *Mechanics' Bank v. Livingston*, 33 Barb. 458 (1861).

² *Graves v. Merry*, 6 Cow. 701 (1827).

³ *Mechanics' Bank v. Livingston*, 33 Barb. 458 (1861).

⁴ *Wardwell v. Haight*, 2 Barb. 549 (1848).

⁵ *Clapp v. Rogers*, 12 N. Y. 283 (1855).

⁶ *Bytes* 85; 1 *Daniel* 343; 1 *Parsons* 143; *Vulliamy v. Noble*, 3 Mer. 619.

⁷ 1 *Daniel* 343.

⁸ *Bytes* 53; *Chitty* 64; 1 *Daniel* 322, 343; 1 *Edwards* § 118; 1 *Parsons* 142; *Carter v. Whalley*, 1 B. & Ad. 11; *Evans v. Drummond*, 4 Esp. 89; *Newmarch v. Clay* 14 East 239; *Heath v. Sansom*, 4 B. & Ad. 172; *S. C.*, 1 Nev. & M. 104; *Kelley v. Hurlburt*, 5 Cow. 534 (1826); *Vaccaro v. Toof*, 9 Heisk. 194 (1872); *Scott v. Colmesnil*, 7 J. J. Marsh. 416 (1832); *Nussbaumer v. Becker*, 87 Ill. 281 (1877); *Armstrong v. Hussey*, 12 Serg. & R. 315 (1825); *Grosvenor v. Lloyd*, 1 Metc. 19 (1840).

necessary as much as in the case of a general partner.¹ But where, after dissolution of a firm consisting of one active and one dormant partner, a note is made by the active partner in the name of himself and of the dormant partner to one who had no notice either of the existence of such firm or of its dissolution, the dormant partner will not be bound.²

Whether the plaintiff had actual notice of the dissolution of a firm, where no formal notice was given, is a question of fact for the jury.³ So, where notice has been given merely by public advertisement in the Gazette, its sufficiency as notice to a new customer is a question for the jury and such publication is admissible as evidence of notice for the jury to consider.⁴ As regards new customers, public notice in the newspapers is sufficient notice of dissolution, and constitutes a good defense in favor of the several partners, without the necessity of an injunction for their protection.⁵ As regards old customers, such notice is insufficient, without proof that the Gazette is taken by them.⁶ And where such customer is a corporation, it is not sufficient to prove that the Gazette was taken or seen by one of its directors.⁷ The usual and prudent course as to old customers of the firm is to announce

¹Carter v. Whalley, 1 B. & Ad. 11; Thompson v. Percival, 3 Nev. & M. 667; S. C., 5 B. & Ad. 925; Nussbaumer v. Becker, 87 Ill. 281.

²Cregler v. Durham, 9 Ind. 375 (1857).

³Dickinson v. Dickinson, 25 Gratt. 321 (1874).

⁴Byles 52; Chitty 67; 1 Edwards § 119; Godfrey v. Turnbull, 1 Esp. 671; Newsome v. Coles, 2 Campb. 617; Farrar v. Deflinne, 1 C. & K. 580. So, Lansing v. Gaine, 2 Johns. 300 (1807), the note in this case being given in a matter foreign to the partnership business.

⁵Chitty 66; Newsome v. Coles, 2 Campb. 617; Wrightson v. Pullan, 1 Stark. 375; *Ex parte* Liddiard, 2 Mont. & Ayr. 87; S. C., 4 Dea. & Chit. 603; Mowatt v. Howland, 3 Day 353 (1809); Dickinson v. Dickinson, 25 Gratt. 321 (1874). And an injunction will not be granted to restrain the surviving partners from the use of a deceased partner's name, Webster v. Webster, 3 Swanst. 490.

⁶Byles 52; Chitty 67; Godfrey v. Turnbull, 1 Esp. 371; Leeson v. Holt, 1 Stark. 186; Graham v. Hope, Peake 154; Gorham v. Thompson. *Ib.* 42; Rex v. Holt, 5 T. R. 443; Williams v. Keats, 2 Stark. N. P. 290; Martin v. Walton, 1 McCord 16 (1821). But, *contra*, if taking proved, Bank of South Carolina v. Humphreys, 1 McCord 388 (1821). See, too, *Ex parte* Usburne, 1 Glyn & Jam. 358; Munn v. Baker, 2 Stark. 255. And even if the paper be shown to have been taken by the party, this will not always suffice for proof of notice, *e. g.* in case of a carrier's notice limiting his responsibility, Rowley v. Horne, 3 Bing. 3.

⁷National Bank v. Norton, 1 Hill 587 (1841).

the dissolution by an actual notice or circular.¹ And a retiring partner should give notice for his protection in the same way, as well as by public notice in the Gazette.²

§ 437. **Implied Notice.**—Notice of dissolution of a firm may be implied from circumstances.³ As regards a new customer, it may be shown to be a matter of public notoriety.⁴ But mere local notoriety will have no effect as notice to a non-resident customer.⁵ Nor will it be sufficient notice to an old customer or creditor of the firm.⁶

Where a banking firm has changed its firm name, this will be sufficient notice to one using such check.⁷ Where a note is signed by a partnership "in liquidation," this will be a sufficient notice of its dissolution.⁸ And mere lapse of time may dispense with the necessity for notice, as has been held in the case of a note drawn in a firm name eleven years after its dissolution and discounted by a bank in another State without any inquiry.⁹

But the formation of a new partnership is not necessarily the dissolution of the old one, and notice of such new firm being formed will not take the place of notice of the dissolution of the former firm.¹⁰ So, the mere fact that a partnership store had been transferred and the firm had ceased to do business is not sufficient evidence of its dissolution, even to a person living in the same place.¹¹ Where, however, an attorney has drawn a deed of dissolution, this will be sufficient notice to him of the dissolution, although the deed was not executed so far as he knew; and if he afterward takes a note made in

¹Jenkins v. Blizard, 1 Stark. 418.

²Simonds v. Strong, 24 Vt. 642 (1852).

³Merrit v. Pollys, 16 B. Mon. 355 (1855).

⁴Lovejoy v. Spafford, 3 Otto 430 (1876).

⁵Southwick v. Allen, 11 Vt. 75 (1839).

⁶Lamb v. Irby, 2 Brev. 490 (1811).

⁷Byles 52; Chitty 67; Barfoot v. Goodhall, 3 Campb. 147. See, too, *Vise v. Fleming*, 1 Y. & J. 227.

⁸Speake v. Barrett, 13 La. An. 479 (1858).

⁹Farmers', &c., Bank v. Green, 1 Vroom 316 (1863).

¹⁰Southwick v. Allen, 11 Vt. 75 (1839).

¹¹Brown v. Clark, 14 Penna. St. 469 (1850).

the name of the firm, the burden is on him to prove that the intention to dissolve was abandoned.¹

But a notice may be defeated by the conduct of the parties who seek the benefit of it. Thus, where partners have left their firm name over the door, they may be liable to a *bona fide* indorsee of their paper given for subsequent transactions in the firm name, although such indorsee be a new customer, and notwithstanding a public notice of dissolution in the Gazette.² So, where the partner seeking to be relieved from liability has informed such customer that the firm was dissolved, but his name would continue in the business for a time.³ So, where a firm has been dissolved by bankruptcy, but the former partners afterwards continue to hold themselves out as such.⁴ And, in like manner, where a former partner declares that the assets of the firm have been left in the hands of the other partner for the purpose of winding up the concern, and that he has no objection to the use of the firm name for that purpose, a jury may infer authority on his part, as we have seen, to indorse and transfer the assets of the old firm.⁵

¹Paterson v. Zachariah, 1 Stark. 71.

²Byles 54; Williams v. Keats, 2 Stark. 290. See, too, Newsome v. Coles, 2 Campb. 617; Stables v. Ely, 1 C. & P. 614.

³Brown v. Leonard, 2 Chitty 120.

⁴Byles 54; 1 Daniel 343; Lacy v. Woolcot, 2 D. & R. 458.

⁵Smith v. Winter, 4 M. & W. 454; Graves v. Merry, 6 Cow. 701.

II. PERSONAL REPRESENTATIVES.

438. Executors and Administrators—Liability of Estate.
 439. Personal Liability.
 440. Rights as Payee.
 441. Transfer by.
 443. Guardians and Trustees—As Maker.
 444. As Payee.

§ 438. Executors and Administrators—Liability of Estate.—

An executor or administrator cannot bind the estate of the deceased person whom he represents by giving a bill or note signed by him as executor or administrator.¹ Nor will the estate be bound by the executor's acceptance of a draft drawn on him for a distributive share of the estate, although the funds of the estate are still in his hands.² Nor can an executor bind his testator's estate by giving a renewal of a note of the testator, which has matured;³ nor by giving his note as executor for goods purchased under the express authority of the testator's will.⁴

On the other hand, an executor by giving his own note for a debt of the estate does not ordinarily discharge the estate from liability, but he may still be sued as executor, in equity at least;⁵ unless the executor's note has been taken in absolute payment of the note or debt of the testator.⁶ And, in general, where an executor has given his note in payment of a debt of the estate which he represents, the estate will remain liable for the consideration of such note.⁷ And a promise on the part of an executor or administrator to pay a debt

¹*Lynch v. Kirby*, 65 Ga. 279 (1880); *Funderburk v. Gorham*, 46 *Ib.* 296 (1872); *Dunne v. Deery*, 40 Iowa 251 (1875); *Kirkman v. Benham*, 28 Ala. 501 (1856); *Gregory v. Leigh*, 33 Tex. 813 (1870); *Curtis v. National Bank*, 39 Ohio St. 579 (1883).

²*Wisdom v. Becker*, 52 Ill. 342 (1869).

³*Cornthwaite v. First Nat. Bank*, 57 Ind. 268 (1877); *Erwin v. Carrol*, 1 Yerg. 144 (1829).

⁴Even though the note be signed "A. B., executor of the estate of C. D., deceased," *Christian v. Morris*, 50 Ala. 585 (1873).

⁵*Douglass v. Fraser*, 2 McCord Ch. 105 (1827).

⁶*Yerger v. Foote*, 48 Miss. 62 (1873).

⁷*Dunne v. Deery*, 40 Iowa 251 (1875).

of the testator may be in consideration of assets of the estate in his hands, and will in such case support a judgment against him *de bonis testatoris*.¹

§ 439. **Personal Liability of Executor.**—Where a note or bill is given by an executor or administrator as such, he will, in general, be individually liable for its payment.² So, upon an indorsement by him as executor;³ or upon his written promise to pay such debt, he having assets of the estate in his hands at the time of giving the promise.⁴ This is true also where he has given his note in renewal of one made by his testator.⁵ In like manner, an administrator will be individually liable on a note given by him for property purchased for the benefit of the estate.⁶ But a note given by an administrator, and expressed to be “For value received by A. (the intestate) and his heirs,” has been held to be void for want of consideration.⁷

The mere addition of “administrator” to an acceptor’s signature does not qualify his liability or render the acceptance of a bill conditional.⁸ But, in general, an executor, like an agent, must expressly limit his promise to payment out of the estate represented in order to avoid individual liability on it.⁹ And merely adding the word “administrator” will not amount to such a restriction, as we have seen; especially where the estate administered is not particularly designated.¹⁰

¹Faxon v. Dyson, 1 Cranch C. C. 441 (1807); Dixon v. Ramsay, *Id.* 472.

²Harrison v. McClelland, 57 Ga. 531 (1876); McFarlin v. Stinson, 56 Ga. 396 (1876); Kirkman v. Benham, 28 Ala. 501 (1856); Christian v. Morris, 50 *Id.* 585 (1873); Rittenhouse v. Ammerman, 64 Mo. 197 (1876); Gregory v. Leigh, 33 Tex. 813 (1870); Winthrop v. Jarvis, 8 La. An. 434 (1853); Beatty v. Tete, 9 La. An. 129 (1854).

³Livingston v. Gaussen, 21 La. An. 286 (1869).

⁴Sleighter v. Harrington, Repository & Term 679; S. C., 2 Taylor 249 (N. C. 1818).

⁵Cornthwaite v. First Nat. Bank, 57 Ind. 268 (1877); Erwin v. Carrol, 1 Yerg. 144 (1829).

⁶Funderburk v. Gorham, 46 Ga. 296 (1872).

⁷Ten Eyck v. Vanderpoel, 8 Johns. 93 (1811).

⁸Tassey v. Church, 4 Watts & S. 346 (1842).

⁹Child v. Monins, 2 Brod. & B. 460, 5 Moo. 281; King v. Thorn, 1 T. R. 489; Ridout v. Bristow, 1 Tyrw. 90; S. C., 1 Cromp. & J. 231; Serle v. Waterworth, 4 M. & W. 9; S. C., 6 Dowl. 684; Nelson v. Serle, 4 M. & W. 795; Liverpool Borough Bank v. Walker, 4 DeG. & J. 24.

¹⁰Tryon v. Oxley, 3 G. Greene 289 (1851).

It has been held, however, that an executor or administrator will not be personally liable on his bill or note given as such beyond the amount of assets actually received by him, unless his promise is founded upon other sufficient consideration.¹ But where the note is given in settlement with a creditor of the estate, and in satisfaction of the debt, and is made payable at a future day, the discharge of the debt against the estate and the indulgence to the administrator are consideration enough to support his personal liability.² Especially where the executor gave his own note to take up that of his testator in consideration of a definite agreement for an extension of time.³ Some new consideration other than the original indebtedness of the deceased is always necessary.⁴ But an executor's note is itself presumptive evidence of sufficient assets of the estate in his hands, which may, however, be rebutted by evidence of want of assets or other consideration.⁵

Where an executor gives a note as such, he is presumed in Louisiana to intend to become personally liable on it, and the burden of proving the contrary rests on him.⁶ And in North Carolina, where such note was given for legal advice rendered to him in his official capacity, he was held personally liable upon it, and parol evidence was not admitted to discharge him from the liability.⁷ An executor may even become liable as member of a firm upon its paper, where he represents a deceased partner and continues to receive a share of the profits of the business in the interest of the estate.⁸

§ 440. **Rights of Executor as Payee.**—In like manner,

¹ *Byrd v. Holloway*, 6 Sm. & M. 199 (1846); *Davis v. French*, 20 Me. 21 (1841). See, too, *Walker v. Patterson*, 36 Me. 273 (1853).

² *Thompson v. Maugh*, 3 G. Greene 342 (1851).

³ *Mosely v. Taylor*, 4 Dana 543 (1836).

⁴ *Hester v. Wesson*, 6 Ala. 415 (1844).

⁵ *Bank of Troy v. Topping*, 13 Wend. 557 (1835).

⁶ *Livingston v. Gaussen*, 21 La. An. 286.

⁷ *Kessler v. Hall*, 64 N. C. 60 (1870).

⁸ And this is true, although his name do not appear in the firm, *Wightman v. Townroe*, 1 M. & S. 412.

where commercial paper is given to one as executor or administrator, such words are held to be merely *descriptio personæ*, and the bill or note will be the individual property of the payee named.¹ This is true, also, where one is designated as "lawful attorney for A., widow of D., deceased;" and such attorney may maintain an action on the note in his own name.² So, where the note is made to one as executor or administrator, he may sue on it in his own name.³

He may also sue on it in his representative capacity. And if he has renounced the executorship without bringing such action, the administrator *de bonis non* may bring the suit on it.⁴ And it has been held that no one but such administrator *de bonis non* can sue in such a case.⁵ If the note is given to the executor for a debt due his testator, it will go to such administrator.⁶ But a suit brought by an executor in his own right on a bond given to him as executor will survive on his death to his representative, and not to the administrator *de bonis non* of his testator.⁷ This has been also held as to a note so given, the note being held to be payable to the executor individually, but the suit being carried on by his representative for the use of the administrator *de bonis non* of his testator.⁸ At common law, where a note or bill is made to an executor as such, he may not only sue on it in his representative capacity, but in such action may join other counts on promises to the testator.⁹

§ 441. **Transfer by Executor.**—An executor or adminis-

¹Cravens v. Logan, 7 Ark. 103 (1846); Thomas v. Relfe, 9 Mo. 373 (1845). A note must not, however, be made payable to the deceased with the intention of vesting it in his personal representative, Valentine v. Holloman, 63 N. C. 475 (1869).

²Austell v. Rice, 5 Ga. 472 (1848).

³Clampitt v. Newport, 8 La. An. 124 (1853); Gilman v. Horsley, 5 Mart. 661 (N. s. 1827); Carter v. Saunders, 2 How. 851 (Miss. 1838).

⁴Sheets v. Pabody, 6 Blackf. 120 (1842).

⁵Leach v. Lewis, 38 Ind. 155 (1871).

⁶Catherwood v. Chabaud, 1 B. & C. 150; S. C., 2 Dowl. & R. 271; Court v. Partridge, 7 Price 591.

⁷Hemphill v. Hamilton, 11 Ark. 425 (1850).

⁸Cravens v. Logan, 7 Ark. 103 (1846).

⁹King v. Thorn, 1 T. R. 487.

trator has power in general to transfer and dispose of the personal property of the deceased, and this power extends to notes taken by him in payment for property sold. He may transfer such note to a distributee of the estate in payment of his share of the estate, and such transferee may thereupon maintain an action in his own name.¹ But such notes are held by the executor under the same trust as the property represented by them, and cannot be assigned by him to a creditor of the estate as collateral or otherwise in preference to, and exclusion of, other creditors.²

An executor cannot transfer a bill or note made to him as executor for a debt due the estate in payment of his individual debts.³ And where he has transferred for such purpose a note made to him in payment for property of the estate which he has sold, a subsequent administrator *de bonis non* may file a bill in equity against the assignee of such note and obtain an injunction against its collection or transfer.⁴ And in such case both executor and assignee may be held liable in equity for the breach of trust, especially where the character of the note is shown on its face.⁵ And where an indorsee has taken a note under such circumstances with notice of its character, the indorsement will be set aside as void. And the fact of its being payable to the payee as executor or administrator will be sufficient notice of its character.⁶

Although one of several executors may transfer personal property belonging to the estate of his testator, yet if a note be made to "the executors of A. B.," all must join in transferring it.⁷ It has been held that if a note be made or transferred to one who is dead by a person ignorant of that fact, it will amount to a making or transfer of the instru-

¹Clark v. Moses, 50 Ala. 326 (1873).

²Payne v. Flournoy, 29 Ark. 500 (1874).

³Booyer v. Hodges, 45 Miss. 78 (1871).

⁴Scott v. Searles, 7 Sm. & M. 498 (1846).

⁵Barwick v. White, 2 Del. Ch. 284 (1861).

⁶Booyer v. Hodges, 45 Miss. 78 (1871); Miller v. Helm, 2 Sm. & M. 687 (1843).

⁷Sanders v. Blain, 6 J. J. Marsh. 446 (1831); Smith v. Whiting, 9 Mass. 334 (1812); Johnson v. Mangum, 65 N. C. 146 (1871).

ment to his personal representative.¹ But such a transfer made knowingly, with the intention of investing the executors with the property, is null and void.²

On the death of the holder of a bill of exchange or note, the right to transfer it passes to his executors or administrators.³ And an indorsement by them is as effectual as if made by the deceased payee.⁴ An executor may transfer a note belonging to his testator as collateral security for a judgment rendered against the testator.⁵ But he cannot transfer without indorsement a note payable to the order of his testator so as to pass a legal title.⁶

§ 442. On the other hand, where the testator has transferred a negotiable note before its maturity by delivery without indorsement, it may be subsequently indorsed by his administrator with the same effect as if done by himself.⁷ And if such delivery was made upon good consideration with an agreement for indorsement which the testator afterward refused to perform, his executor may be compelled, by a bill in equity, to make such indorsement.⁸ But an executor cannot, by delivery, complete the transfer of a bill which has been indorsed and not delivered by his testator.⁹ Nor can he deliver a note payable to his testator and indorsed in blank by him.¹⁰ Nor can an executor complete an accommodation indorsement of his testator which was delivered after the testator's death, in ignorance of that event, to one who discounted the note so indorsed on the strength of it; and

¹ *Murray v. East India Co.*, 5 B. & Ald. 204.

² *Valentine v. Holloman*, 63 N. C. 475 (1869).

³ *Rawlinson v. Stone*, 3 Wils. 1; S. C. 3 Stra. 1260; *Clark v. Moses*, 50 Ala. 326 (1874); *Owen v. Moody*, 29 Miss. 79 (1855); *Hamrick v. Craven*, 39 Ind. 241 (1872); *Makepeace v. Moore*, 10 Ill. 474 (1849); *Cahoon v. Moore*, 11 Vt. 604 (1839).

⁴ *Watkins v. Maule*, 2 Jac. & W. 243.

⁵ *Wheeler v. Wheeler*, 9 Cow. 34 (1828).

⁶ *Taylor v. Surget*, 14 Hun 116 (1878).

⁷ *Malbon v. Southard*, 36 Me. 147 (1853).

⁸ *Smith v. Pickery*, Peake 50.

⁹ *Bromage v. Lloyd*, 1 Exch. 32; *Clark v. Boyd*, 2 Ohio 57 (1825).

¹⁰ *Clark v. Sigourney*, 17 Conn. 510 (1846).

the estate of the testator will not be bound by a fresh delivery by the executor.¹

As has been said, one of several executors may transfer a note or bill payable to their testator,² although this has been questioned.³ And it has been held in New York, that one of two executors may even transfer a bond and mortgage made to them in their representative capacity.⁴ A transfer by an executor in the State where he is appointed, will enable the transferee to sue in another State in his own name.⁵ Where the executor adds to his signature in an assignment the words "executor and devisee," this will be notice to the assignee of the will and its contents; and if the transfer be made in consideration of an individual debt of the executor or a partnership debt of his firm, the assignee will take the instrument with notice of the breach of trust on the executor's part.⁶ But where an executor charges himself with the amount of a note belonging to his testator, he thereby becomes the owner of it.⁷ He cannot, however, acquire claims against the estate for less than their actual value by false representation as to the responsibility and sufficiency of the estate, and then hold them against the estate; but a claim so acquired will be held by him for the benefit of the estate.⁸

§ 443. **Guardians and Trustees—As Maker.**—The rule as to guardians and trustees is the same as that which governs executors or administrators. Where a guardian gives a note he will be personally liable for its payment,⁹ and may be sued upon it as his individual note.¹⁰ More especially he

¹ *Michigan Ins. Co. v. Leavenworth*, 30 Vt. 11 (1856).

² *Dwight v. Newell*, 15 Ill. 333 (1854). See, too, *Johnson v. Mangum*, 65 N. C. 146 (1871).

³ *Winterbottom's Case*, 1 Dennison's C. C. 51; S. C., 2 Car. & K. 37. In this case the indorsement was held sufficient to sustain an indictment for forgery.

⁴ *Hertell v. Bogert*, 9 Paige 52, 4 Hill 492 (1842).

⁵ *Grace v. Hannah*, 6 Jones 94 (1858).

⁶ *Miller v. Williamson*, 5 Md. 219 (1853).

⁷ *Dunlap v. Newman*, 47 Ala. 429 (1872); *Buie v. Pollock*, 54 Miss. 9 (1877).

⁸ *Burton v. Slaughter*, 26 Gratt. 914 (1875).

⁹ *Forster v. Fuller*, 6 Mass. 58 (1809).

¹⁰ *Robertson v. Banks*, 1 Sm. & M. 666 (1844).

cannot render the estate of his ward liable by giving a note as surety for a third person.¹ And he will be individually liable even upon a note given for services rendered to his ward, although he may in such case charge the ward's estate with the amount paid.² In Louisiana it has been held that a guardian will not incur an individual liability for a draft given for the benefit of his ward in the management of the ward's plantation, even though the draft be not signed by him as guardian.³ In Texas, where a note is given by a guardian as such and action brought upon it, execution will be rendered against the guardian without reference to the course of administration of the estate.⁴ But in a suit to recover on such a note against the estate of the ward, judgment should not be rendered against the guardian personally.⁵ Where drafts are signed by commissioners as such, they have been held to bind them individually.⁶ So, a note indorsed or signed "A. B., receiver,"⁷ but not a note signed "C. D. by her trustee A. B."⁸ A guardian cannot bind his ward's estates in Louisiana by giving a note as such without judicial authority and without benefit accruing to the estate.⁹ But in that State the maker of a note, signed without any word which designates him as guardian, may prove by parol that the note was given by him as such in consideration of a debt due from his ward.¹⁰

§ 444. **Guardian or Trustee as Payee.**—A guardian, like an executor, may transfer a note made to him as such, and one who takes it without notice of any breach of trust will

¹ *McGavock v. Whitfield*, 45 Miss. 452 (1871); *Shiff v. Shiff*, 20 La. An. 269 (1868).

² *Poole v. Williams*, 42 Ga. 539 (1871).

³ *Lapeyre v. Weeks*, 28 La. An. 664 (1876).

⁴ *Gibson v. Irby*, 17 Tex. 173 (1856).

⁵ *McDaniel v. Mann*, 25 Tex. 101 (1860).

⁶ *Eaton v. Bell*, 5 B. & Ald. 34.

⁷ *Towne v. Rice*, 122 Mass. 67 (1877).

⁸ *Taylor v. Shelton*, 30 Conn. 122 (1861).

⁹ *Johnson's Succession*, 4 La. An. 253 (1849).

¹⁰ *Leonard v. Hudson*, 12 La. An. 840 (1857).

acquire a good title by such transfer.¹ But where he has transferred such a note in payment of an individual debt of his own to one having knowledge of that fact, there can be no recovery.²

Where a note is made to one as guardian, he may sue upon it in his own name and right,³ even after the expiration of his office.⁴ And after his death his executor may sue on it.⁵ But a guardian cannot surrender or cancel a note made to his ward and take a worthless security in lieu of it.⁶ Nor can a guardian, who has taken a note to himself in such capacity, credit upon it an individual debt of his own to the maker of the note, although then solvent.⁷ But where a note is made to a guardian, the debts of his ward are a proper set-off against it.⁸ Where a guardian has loaned funds belonging to his ward and taken a note for the loan payable to himself individually, he cannot afterwards, upon the insolvency of the borrower, show that the note was taken by him as guardian for the funds of his ward.⁹

A bill or note made to one as "trustee" has been held not to be commercial paper and an indorsement by the trustee transfers it subject to the trust.¹⁰ But where a note is made to one as trustee of his wife, it has been held that he may make a transfer of it without her joining in the transfer.¹¹

¹*Fountain v. Anderson*, 33 Ga. 372 (1862); *Thornton v. Rankin*, 19 Mo. 193 (1853).

²*Coons v. Kendall*, 27 La. An. 443 (1875).

³*Bingham v. Calvert*, 13 Ark. 399 (1853).

⁴*Zachary v. Gregory*, 32 Tex. 452 (1870).

⁵*Chitwood v. Cromwell*, 12 Heisk. 658 (1874).

⁶*Smith v. Dibrell*, 31 Tex. 239 (1868).

⁷*Baughn v. Shackelford*, 48 Miss. 255 (1873).

⁸*Nickerson v. Gilliam*, 29 Mo. 456 (1860).

⁹*Knowlton v. Bradley*, 17 N. H. 458 (1845).

¹⁰*Third Nat. Bank of Baltimore v. Lange*, 51 Md. 138 (1878); *Sturtevant v. Jaques*, 14 Allen 523 (1867). So, of a certificate of stock, *Shaw v. Spencer*, 100 Mass. 382 (1868).

¹¹*Westmoreland v. Foster*, 60 Ala. 448 (1877).

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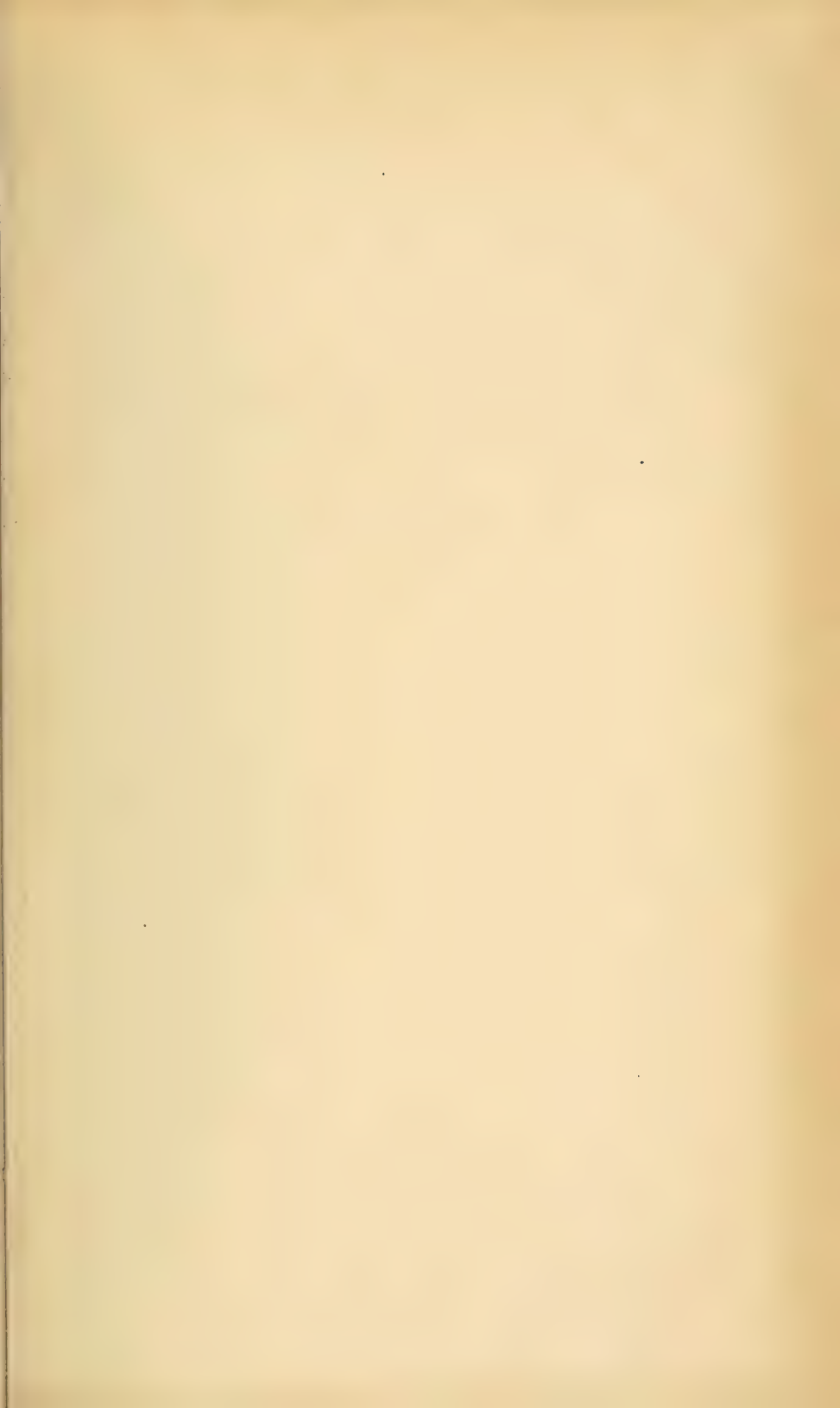
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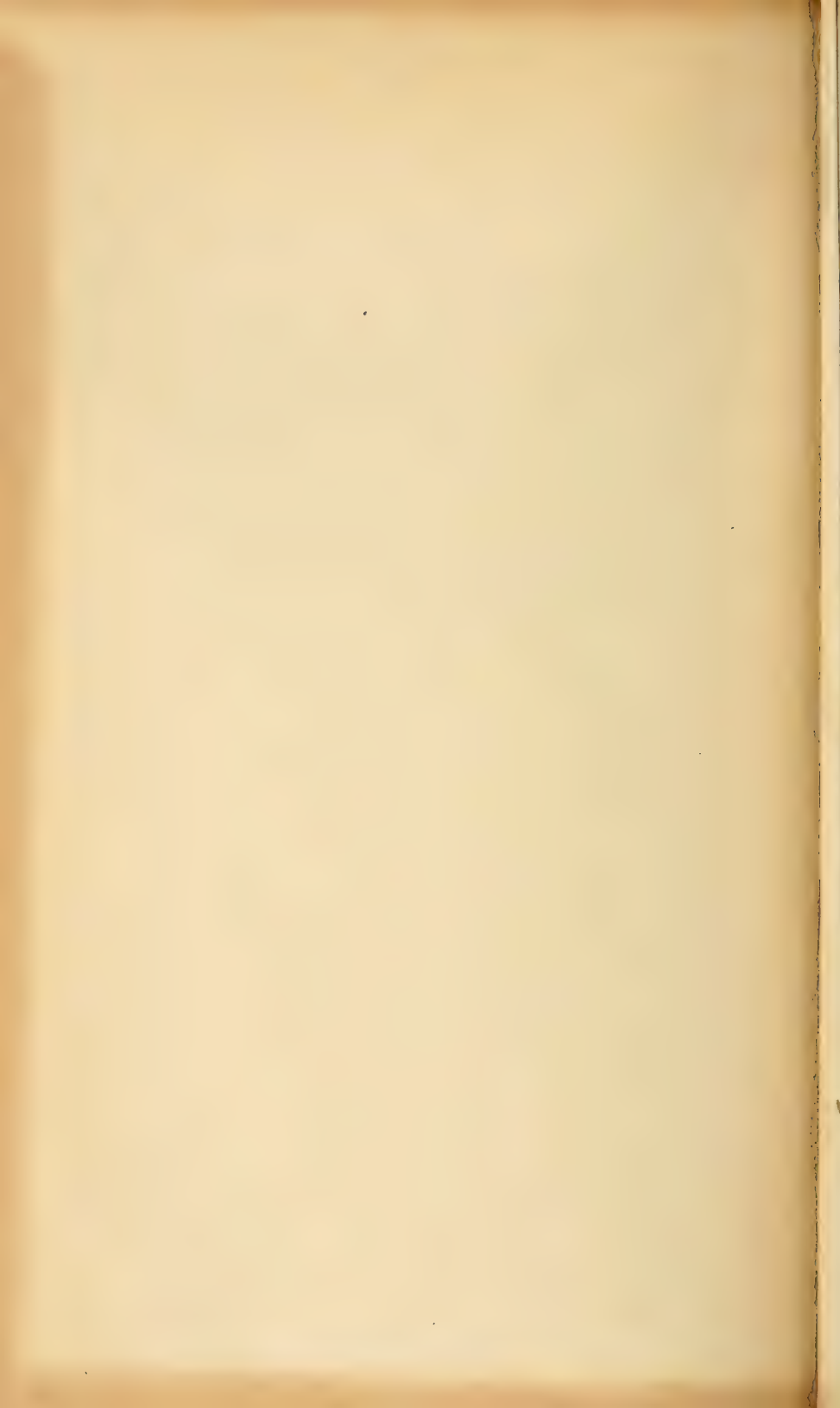
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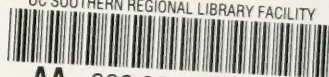




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